

Issues: Qualification – Management Actions (Recruitment/Selection), Discrimination (Race and Gender); Ruling Date: July 7, 2010; Ruling #2010-2512; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Behavioral Health and
Developmental Services
Ruling Numbers 2010-2512
July 7, 2010

The grievant has requested a ruling on whether her September 22, 2009 grievance with the Department of Behavioral Health and Developmental Services (“DBHDS or the agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Registered Nurse (“RN”) with DBHDS. On August 26, 2009, the grievant interviewed for a Registered Nurse Clinician B (“RNCB”) position within the agency (“Position #1461”). Position #1461 was located on an all-male ward of the facility. The grievant was not the successful candidate for Position #1461, and on September 22, 2009, the grievant filed a grievance challenging her nonselection. In her grievance, the grievant asserts that her nonselection was a misapplication of policy and discriminatory on the basis of sex and race. In addition, the grievant alleges that Caucasian RN’s, both male and female, are paid more than African American RN’s at the facility where she works.

The agency head failed to qualify the September 22, 2009 grievance for a hearing and the grievant now seeks a qualification determination from this Department.

DISCUSSION

The grievance procedure recognizes management’s exclusive right to manage the operations of state government, including the hiring or promotion of employees within an agency.¹ Inherent in this right is the authority to weigh the relative qualifications of job applicants and determine the “best-suited” person for a particular position based on the knowledge, skills, and abilities required. Accordingly, a grievance challenging the selection process does not qualify for a hearing unless there is evidence raising a sufficient question as to

¹ See Va. Code § 2.2-3004(B).

whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.² The grievant's claims are discussed below.

Selection for Position #1461

Misapplication of Policy

For an allegation of misapplication 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. Additionally, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."³ Thus, typically, the threshold question is whether or not 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 Here, the grievant would appear to satisfy the threshold adverse employment action because she is challenging her failure to be selected for 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

In support of her claim that policy has been misapplied and/or unfairly applied, the grievant asserts that she has more experience as an RN and as such, was more qualified than the individual selected for Position #1461. This Department concludes, however, that the grievant has not presented evidence to raise a sufficient question as to whether the agency's assessment of her qualifications was arbitrary or capricious, or whether the selection was plainly inconsistent with other similar decisions by the agency. For example, according to the agency, the candidate selected for Position #1461 was selected, at least in part, due to his extensive previous

² *Grievance Procedure Manual* § 4.1(c).

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.*, EDR Ruling No. 2007-1651.

⁷ *Grievance Procedure Manual* § 9.

experience in an all-male environment.⁸ The grievant likewise has experience in an all-male environment, but admits that she does not have as much experience as the selected candidate. Accordingly, this Department cannot conclude that the hiring decision was in disregard of the facts or without a reasoned basis.⁹

The grievant also challenges the panel's decision not to hire her on the basis that her interview answers "did not reflect knowledge of employee that has been here since 1984."¹⁰ The grievant asserts that this comment on the Interview Documentation and Evaluation Worksheet violates that section of DHRM Policy 2.10 that says one's ability to perform the job cannot be "inferred from years of experience."¹¹ In addition, the grievant asserts that her total years of service should not be taken into account because the only years of service that matter are those that she was employed as an RN with the facility.¹²

Contrary to the grievant's assertion, the panel members did not seem to be questioning the grievant's *ability* to perform the functions of Position #1461 with their statement on the Interview Documentation and Evaluation Worksheet, but rather, questioned the grievant's *knowledge* as demonstrated by her answers to the interview questions and in relation to her years of experience with the agency. Accordingly, because the reference to the grievant's years of experience appears to have had nothing to do with the grievant's ability, the panel members would not appear to have violated that section of policy that states ability cannot be inferred from years of experience. Moreover, considering all of the grievant's prior years of experience in assessing her relevant knowledge and adequacy of answers to the interview questions for

⁸ Prior to his employment with DBHDS, the selected candidate worked at a male populated correctional center for approximately 12 years.

⁹ The grievant also appears to suggest that the selected applicant was preselected for Position #1461 because he allegedly stated to her after his interview that he has been employed with the state for 13 years. The grievant appears to view this applicant's statement regarding his years of service as some sort of a preemptive justification for his having been selected. 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. *See* DHRM Policy 2.10. Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness. Va. Code § 2.2-2901(A) 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. In this case, even if this Department were to assume that the selected applicant made such a statement to the grievant after his interview, this statement is insufficient to raise a question that the agency was merely going through the motions of the selection process especially in light of the selected candidate's apparent suitability for Position #1461.

¹⁰ It should be noted that according to the grievant, she has only been employed with the agency since 1986, not 1984 as stated by the interview panel. The exact year she began employment with the agency is immaterial. The significant issue here is whether the agency misapplied or unfairly applied policy by considering her years of experience in assessing her relative knowledge and answers to the interview questions.

¹¹ DHRM Policy 2.10 defines "ability" as "A demonstrated competence to perform observable behavior, or a behavior that results in an observable product. Ability denotes current competence in doing specific job content actions; it does not denote a person's capacity to acquire this competence, nor can it be inferred from years of experience. Those involved in the hiring process should take care not to confuse an ability, which is currently demonstrable, with an aptitude, which is the potential for acquiring an ability."

¹² The grievant has only been an RN with the facility since 2005 and prior to that she was Human Services Care Worker (HSCW).

Position #1461 does not appear to violate any policy provision¹³ nor was it arbitrary and capricious or inconsistent with the assessment of other interviewees for Position #1461. For instance, as noted above, the selected applicant's prior work experiences were also considered in assessing whether he had the knowledge to perform the functions of Position #1461.

The grievant also raises several concerns with the composition of the panel members.¹⁴ In particular, the grievant asserts that she feels she was not given a fair interview because the panel was not diverse, two of the four panel members were panel members in previous positions for which she was interviewed, one of the panel members was the grievant's previous supervisor, and two of the panel members are "good friends with" with each other. In addition, the grievant claims that it was improper for a member of the human resources department to serve as a panel member because she lacks relevant nursing knowledge and experience.

DHRM Policy 2.10 states that, "[w]hen a selection panel is used, panel members *should* represent a diverse population."¹⁵ The use of the word "should" indicates that these guidelines are discretionary rather than mandatory. Moreover, policy does not appear to prohibit the use of panel members who currently, or have ever, worked with any of the potential candidates;¹⁶ individuals from repeatedly serving as a panel member for a specific position; or individuals who are friends from occupying the same panel. More importantly, the grievant has not demonstrated that any of the panel members in question were biased against the grievant as a result of their prior knowledge of the grievant as an employee or interviewee. In addition, DHRM Policy 2.10 specifically allows for a member of human resources to serve on the interview panel¹⁷ and the grievant has failed to demonstrate that the presence of a member of human resources compromised the selection process. As such, this Department finds no policy violations in the panel composition for Position #1461.

Additionally, the grievant claims policy was misapplied because her references were not contacted. DHRM Policy 2.10 states that "[a]gencies should check references with the current and at least one former supervisor *of the applicant who is the final candidate for the position.*"¹⁸ Here, the grievant was not the selected candidate for the position. Accordingly, the agency did not misapply policy by failing to contact her references.

Finally, the grievant asserts that one of the panel members inappropriately discussed a candidate's interview with individuals not involved in the hiring process while the interview process was ongoing and that this conduct was "unethical."¹⁹ Policy specifically says that panel

¹³ On the contrary, prior work experience is often crucial to a selection determination.

¹⁴ According to the agency, the panel consisted of the RN Coordinator for the unit where the selected candidate for Position #1461 would report as well as two RN Coordinators from other units. The final panel member was a member of the facility human resources department.

¹⁵ DHRM Policy 2.10, "The Selection Process."

¹⁶ Such a requirement would be virtually impossible to achieve given that state employees are frequently applying for promotions within their current departments.

¹⁷ DHRM Policy 2.10.

¹⁸ *Id.*

¹⁹ On the morning of August 26, 2009, prior to interviews being conducted on that day, a panel member stated, "the girl that previously interviewed did not do well at all, after the first question was asked it was down hill from there."

members should “hold confidential all information related to the interviewed applicants and the selection or recommendation.”²⁰ However, the comment, while inappropriate, was not made about the grievant and as such, this issue does not pertain directly and personally to the grievant.²¹ More importantly, the agency appears to agree that the panel member’s comments were potentially inappropriate and has indicated that it will take steps to ensure that similar behavior does not occur in the future.

Based on the foregoing, the grievant’s claim of misapplication and/or unfair application of state and agency hiring policies does not qualify for a hearing.

Discrimination

In this case, the grievant asserts that she was not selected for Position #1461 as a result of discrimination based on race and gender. For a claim of race and/or gender discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether she was not selected for the position *because of* her membership in a protected class.²² In order to establish a claim for unlawful discrimination in the hiring or selection context the grievant must present evidence raising a sufficient question as to whether: (1) she was a member of a protected class; (2) she applied for an open position; (3) she was qualified for the position, and (4) she was denied the position under circumstances that create an inference of unlawful discrimination.²³ 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 sufficient evidence that the agency’s stated reason was merely a pretext or excuse for discrimination.

In addition to her overall assertion that she was more qualified for Position #1461 than the selected applicant and therefore her non-selection must have been based on discriminatory animus, the grievant offers the following in support of her discrimination claim: (1) she has applied for a promotion to RNCB five times now and has been denied the position each time; and (2) there is an overall lack of African Americans in management positions at her facility.

As an African American female, the grievant is a member of a protected class. Moreover, the grievant applied for an open position and as evidenced by her being interviewed for Position #1461, was at least minimally qualified. However, the grievant has failed to raise a sufficient

²⁰ DHRM Policy 2.10.

²¹ See *Grievance Procedure Manual* § 2.4. Moreover, in the present case, even if the conduct challenged by the grievant pertained directly and personally to her and was a violation of policy, effectual relief is unavailable to this grievant through the grievance procedure. For misapplications of policy, a hearing officer could order the agency to reapply policy correctly, which, as a practical matter would have little effect on any past disclosure of information that is to remain confidential during the interview process. Additionally, hearing officers cannot order agencies to take corrective action against employees. See *Grievance Procedure Manual* § 5.9(b)(6).

²² See *Huchinson v. INOVA Health System, Inc.*, Civil Action 97-293-A, 1998 U. S. Dist. LEXIS 7723, at *3 (E.D. Va. April 8, 1998) (citing *St. Mary’s Honor Center v. Hicks*, 509 U. S. 502 (1993)).

²³ See *Dugan v Albemarle County School Bd.*, 293 F.3d 716, 720-721 (4th Cir. 2002); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001).

question as to whether she was denied the position under circumstances that create an inference of unlawful discrimination. In particular, according to the agency, the successful applicant was selected based on his prior experience in an all-male environment as well as his strength of responses to the interview questions. Accordingly, while potentially relevant to the grievant's claim that she was discriminated against, the grievant's nonselection in prior recruitments is insufficient to overcome the agency's stated legitimate, non-discriminatory reason for its selection decision for Position #1461.²⁴

In response to the grievant's assertion that there is a general lack of African Americans in management positions, and that this disparity is an indicator that she was discriminated against in the selection determination for Position #1461, this Department notes that according to the statistics provided by the grievant when she filed her grievance, of the possible 44 RNCB positions, three were occupied by African Americans. However, according to the grievant, there were only five African American RN's at the facility when she filed her grievance. As such, there were only two African Americans not in a management position at the time she initiated her grievance.²⁵ These facts do not raise a sufficient question as to whether discrimination based on race is tainting the hiring processes for management positions at the grievant's facility.²⁶

Based on the foregoing, the grievant has failed to raise a sufficient question that her nonselection for Position #1461 was discriminatory on the basis of race and/or gender. Accordingly, this issue does not qualify for a hearing.

Disparity in Pay

The grievant alleges that pay disparities affecting her salary are, at least in part, the result of discrimination based on race and gender. Specifically, she has alleged salary inequalities between herself and male employees with the same job title and less experience as well as salary

²⁴ The grievant has failed to provide any evidence that the prior selection decisions were based on race or gender. The simple fact that the person selected in prior recruitments was of a different race or gender than the grievant does not, without more, indicate discrimination sufficient to overcome the agency's legitimate non-discriminatory reason for its selection decision for Position #1461.

²⁵ In addition, while the grievant is correct that there are no African Americans occupying the management position of RN Coordinator, according to the agency, the last two recruitments for this position yielded no applications from African Americans.

²⁶ This Department reviewed the grievant's claim of gender discrimination under a disparate-impact theory of discrimination as well. To prevail with a disparate-impact discrimination claim, a grievant need not provide evidence of the employer's *subjective* intent to discriminate on the basis of her membership in a protected class. Instead, a grievant must demonstrate that a policy applied by the employer, although neutral on its face, is discriminatory in its application. *Barnett v. Technology International, Inc.*, 1 F. Supp. 2d 572, 579 (E.D.Va. 1998). In this case, the hiring of a male for Position #1461 in part due to his prior extensive experience in an all-male environment does not raise a sufficient question of disparate impact discrimination. More specifically, at the facility in question, there is one all-male ward and there are six RNCB's on this ward. Of those six, two are male and four are female. Accordingly, there does not appear to be any statistical disparity based on gender as the number of female RNCB's on the all-male ward is twice that of males and as such, any claim of disparate-impact gender discrimination would not qualify for a hearing.

inequalities between herself and Caucasian employees, both male and female, with the same job title and less job experience.

To support her claim of discriminatory pay disparities, the grievant provides seven examples of Caucasian male and female employees who purportedly have higher salaries than the grievant but have less experience. However, while three of these individuals do have a higher salary than the grievant, these individuals are in the role of RNCB and are not RN's like the grievant. Further, one of the female Caucasian employees cited by the grievant actually makes less money than the grievant and has almost exactly the same number of months of service at the facility where the grievant works. More specifically, Employee B is a Caucasian female RN with 46 months experience at the facility. She, like the grievant, became an RN in 2005 and has a current salary of \$47,312. The grievant has 49 months experience at the facility and has a current salary of \$47,909. Other relevant salary information investigated by this Department does not support a finding of discriminatory pay practices either.²⁷

In sum, the evidence presented by this grievance fails to raise a sufficient question as to whether any disparities in pay are the result of discrimination based on gender or race. Thus, the grievant's claim of pay disparities cannot be qualified.²⁸

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

²⁷ More specifically, there are four Caucasian male RN's at the grievant's facility. Of these four, three have a higher salary than the grievant. However, one of the three has significantly more years of experience than the grievant. Moreover, there are 24 Caucasian female RN's. Of these, 14 have a higher salary than the grievant while 10 have a lower salary than the grievant.

²⁸ Nor does the grievant's claim qualify for hearing as a claim of unequal pay due to gender discrimination under the Equal Pay Act (EPA). *See* 29 U.S.C. § 206(d)(1). For a discrimination claim under the EPA to qualify for hearing, a grievant must show, for employees working in the same "establishment," that: (1) the agency has paid different wages to employees of opposite sexes; (2) those employees hold jobs that require equal skill, effort, and responsibility; and (3) those jobs are performed under similar working conditions. 29 U.S.C. § 206(d)(1); *see also* *Collins v. Landmark Military Newspapers, Inc.*, No. 2:06cv342, 2007 U.S. Dist. LEXIS 57572, at *38-40 (E.D. Va. Aug. 3, 2007) and *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 613 (4th Cir. 1999). If, however, the agency presents sufficient evidence that the wage difference between the male and female employees was the result of either (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex, the grievance will not qualify for hearing unless the grievant can produce evidence raising a sufficient question that the pay differences were nevertheless based on gender. 29 U.S.C. § 206(d)(1); *see also* *Brinkley*, 180 F.3d at 613-15. Furthermore, the EEOC Compliance Manual indicates that "if other women are paid the same as or more than males, this may indicate that a factor other than sex explains the complainant's compensation." EEOC Compliance Manual § 10-IV(E)(1). In this case, because there are other female employees with higher salaries than comparable male employees in the same position occupied by the grievant, it bolsters the argument that the salary differentials resulted from a "factor other than sex." Based on this analysis, this grievance does not raise a sufficient question that any differentials in the grievant's salary were the result of gender-based discrimination.

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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