Issues: Qualification – Management Actions (Recruitment/Selection) and Discrimination (Race and Gender); Ruling Date: July 20, 2010; Ruling #2010-2513; 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 2010-2513
July 20, 2010

The grievant has requested a ruling on whether her September 21, 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

At the time this grievance was filed, the grievant was employed as a Registered Nurse ("RN") with DBHDS.[1] On August 25, 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 unit at the facility. The grievant was not the successful candidate for Position #1461, and on September 21, 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. The agency head failed to qualify the September 21, 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.[2] 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 whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.[3] As stated above, in this case, the grievant claims that the agency misapplied or unfairly applied state and agency hiring policies and discriminated against her on the basis of race and

[1] According to the parties, the grievant was recently promoted.
[2] *See* Va. Code § 2.2-3004(B).
[3] *Grievance Procedure Manual* § 4.1(c).

gender in failing to select her for Position #1461. The grievant's claims will be discussed below.[4]

Selection for Position #1461

Misapplication of Policy

In support of her claim that policy has been misapplied and/or unfairly applied, the grievant asserts that she has more work experience and a stronger educational background and as such, was more qualified than the individual selected for Position #1461.

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."[5] Thus, typically, the threshold question is whether or not 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] 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

[4] In addition, during this Department's investigation, the grievant alleged that she has been the victim of retaliation. In particular, the grievant claims that she was denied a request for tuition reimbursement after she filed her September 21, 2009 grievance. Under the grievance procedure, "[o]nce the grievance is initiated, additional claims may not be added." *Grievance Procedure Manual* § 2.4. Accordingly, the grievant should have initiated a separate grievance to challenge management's action and as such, the grievant's claim that she was denied tuition reimbursement as a result of filing a grievance cannot be addressed here. Moreover, it should be noted that although the request for tuition reimbursement was initially denied, it was later approved and appears to have been denied initially as a result of a misinterpretation of agency policy on which programs qualify for tuition reimbursement.

[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).

within the agency or otherwise arbitrary or capricious.[8] Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."[9]

This Department concludes that the grievant has not presented evidence to raise a sufficient question that the agency's assessment of her qualifications was arbitrary or capricious, or that 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 experience in an all-male environment.[10] The grievant likewise has experience in an all-male environment, but appears to have less experience than the selected candidate.[11] Moreover, based upon representations by the agency, it appears that the selected applicant performed better during the interview than the grievant. That is, according to the "Interview Documentation and Evaluation" worksheets completed in response to the grievant's interview, the panel members found some of the grievant's answers to be "incomplete" and not "recovery oriented." In contrast, the panel members concluded that the selected applicant's interview answers "reflected knowledge of recovery model and hospital mission." Based on the foregoing, this Department cannot conclude that the hiring decision was in disregard of the facts or without a reasoned basis.

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*."[12] Here, the grievant was not the selected candidate for the position. Accordingly, the agency did not misapply policy by failing to contact her references.

The grievant also challenges the fact that a human resources representative was one of the panel members for the hiring of Position #1461 because her presence on the panel constituted a conflict of interest.[13] More specifically, the grievant asserts that according to facility policy, the human resources department is responsible for reviewing selection decisions to ensure compliance with all applicable policies and procedures[14] and the review process is compromised if the person required to ensure compliance has served on the panel. The grievant has failed to raise a sufficient question that the presence of a member of human resources compromised the selection process in this case. Moreover, DHRM Policy 2.10 specifically allows for a member of

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[8] *See, e.g.*, EDR Ruling No. 2007-1651.
[9] *Grievance Procedure Manual* § 9.
[10] Prior to his employment with DBHDS, the selected candidate worked at a male populated correctional center for approximately 12 years.
[11] According to the grievant, she has worked on the all-male unit at the facility when needed to cover a staff shortage. Moreover, the grievant, like the selected applicant, previously worked in a male populated correctional center. However, she worked part-time and only did so for approximately six months.
[12] DHRM Policy 2.10.
[13] 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.
[14] Hospital Instruction No. 3020 states, "[t[he hiring supervisor forwards all material to the Human Resources Office for review to ensure compliance with applicable policies."

human resources to serve on the interview panel[15] and as such, this Department finds no policy violations in the panel composition for Position #1461.

Finally, the grievant asserts that one of the panel members inappropriately discussed her interview with individuals not involved in the hiring process while the interview process was ongoing.[16] Policy specifically says that panel members should "hold confidential all information related to the interviewed applicants and the selection or recommendation."[17] However, in some cases, qualification is inappropriate even if an agency has misapplied policy. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In the present case, even if the conduct challenged by the grievant constituted a misapplication 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.[18] Therefore, because a hearing officer could not provide the grievant with any meaningful relief, this grievance is not qualified for hearing. Additionally, 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.

Pre-Selection

Moreover, the grievant claims that the selected candidate was pre-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.[19] Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[20] 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.

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[15] DHRM Policy 2.10.

[16] More specifically, the grievant was interviewed on August 25, 2009, while all other candidates were interviewed on August 26, 2009. On the morning of August 26, 2009, prior to interviews being conducted on that day, a panel member stated, "[t]he girl that previously interviewed did not do well at all, after the first question was asked it was down hill from there."

[17] DHRM Policy 2.10.

[18] *Grievance Procedure Manual* § 5.9(b).

[19] *See* DHRM Policy 2.10.

[20] Va. Code § 2.2-2901(A) (stating, in part, that "[i]n 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).

In support of her claim that pre-selection tainted the hiring process for Position #1461, the grievant asserts the following: (1) when the grievant arrived at her interview, a panel member allegedly stated, while laughing, "[w]e need to be professional and go through the steps to introduce ourselves;" (2) the interview panel consisted of four individuals instead of the normal two for past selections and this was done so that the agency could later claim fairness in the selection process; (3) the interview panel wrote "do not offer position" on the grievant's "Interview Documentation and Evaluation" worksheet before all candidates had been interviewed; (4) the panel members failed to accurately document the grievant's responses on the "Interview Documentation and Evaluation" worksheet and as evidenced by the term "etc…" on one of the grievant's interview evaluation summaries, the panel members failed to document all of the information provided by the grievant during her interview; and (5) the selected candidate worked overtime on the unit where Position #1461 would be located and had worked for one of the panel members previously. The grievant's assertions will be discussed in turn below.

The comment by a panel member regarding the need to make introductions while laughing does not raise a sufficient question of pre-selection. The grievant admits that she knew all of the panel members prior to the interview. Moreover, the panel member who allegedly made the statement and laughed stated during this Department's investigation that introductions are always made at the beginning of an interview and that she did so in this case, but she does not recall any laughter at the time of the introductions. This panel member also stated that most of the time, the panel members know the individual being interviewed and as noted above, the grievant has indicated that this was the case here. As such, even if we were to assume that there was laughter, any such laughter was more likely related to the fact that the panel members and the grievant all knew each other, thereby rendering formal introductions somewhat odd, and not because the panel had already determined the person they were going to select for Position #1461.

Further, while it appears that past selections may have involved only two panel members, the grievant has not demonstrated that panel members for Position #1461 were added for improper purposes. The agency has indicated that the number of panel members has increased since the "most recent change in Nursing Administration" and the additional members make for a more "fair interview panel." Moreover, this Department cannot conclude that the panel wrote "do not offer position" on the grievant's "Interview Documentation and Evaluation" worksheet before all candidates had been interviewed. The "Interview Documentation and Evaluation" worksheets simply bear an interview date of August 25, 2009. There is nothing, other than the grievant's contention, that indicates that the panel members wrote "do not offer position" on that same date. In fact, during this Department's investigation for this ruling, one panel member verified that "do not offer position" was written on the grievant's "Interview Documentation and Evaluation" worksheet after all candidates had been interviewed.

With regard to the grievant's assertion that the panel members failed to fully document her answers during the interview, this Department notes that failure to document every single word of an interviewee would not necessarily be indicative of pre-selection or some other improper motive. On the other hand, however, intentional failure to document a candidate's

answers such that that candidate would appear less qualified for the position could pose a problem. However, in this case, the grievant has failed to raise a sufficient question that the panel members intentionally failed to document the grievant's answers or that the panel members' documentation of the grievant's answers were lacking. More specifically, during this Department's investigation, the grievant indicated that one of the three panel members failed to document everything she stated in response to Question #6 as evidenced by use of the term "etc…" when documenting the grievant's answer. Question #6 dealt with how the grievant would respond to a situation where a patient, who had a history of faking falls, had fallen. One of the panel members transcribed the grievant's answer as "[f]irst, assess him to see if legitamate [sic] fall. Due [sic] head to toe assessment for pain, swelling, etc. If okay, help him up, ask how fall happened, if attention seeking provide 1:1 time to see what their needs are." Accordingly, while one of the three panel members used the term "etc…," her use of the term was not inappropriate nor did it detract from the greivant's answer to the question.

Finally, while the selected candidate apparently worked overtime on the all-male ward and his name was posted as a person to call for overtime opportunities, it appears that the selected candidate was one of many volunteers who were on a call list for observation of a very difficult patient that needed staffed 2:1. More importantly, the grievant has failed to provide sufficient evidence that the selected candidate's volunteering to work overtime on the all-male unit somehow improperly influenced the selection process for Position #1461. Moreover, to the extent the grievant is claiming that the selected candidate's prior work experience on the all-male unit was a factor in the selection determination, as noted above, the grievant too had experience working on that unit and had done so on numerous occasions during times of staff shortage.

Based on the foregoing, this Department cannot conclude that pre-selection tainted the hiring process for Position #1461.

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.[21] 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.[22] 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

[21] *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)).
[22] *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).

sufficient evidence that the agency's stated reason was merely a pretext or excuse for 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. In support of her discrimination claim, the grievant asserts that she (as well as many others) was more qualified for Position #1461 than the selected applicant and therefore her non-selection must have been based on discriminatory animus. In addition, the grievant asserts that Position #1461 was located on an all-male ward and the agency wanted a male to fill the position.

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 a least minimally qualified. However, the grievant has failed to raise a sufficient question that 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 because he performed well during the interview. In addition, although the agency recognizes that the successful applicant had less experience than the grievant as an RN, the agency appears to have based its decision at least in part of the fact that the successful applicant had prior experience in an all male environment at a correctional center. While the grievant may disagree with the agency's assessment of the selected applicant's qualifications for Position #1461, her disagreement with the agency's assessment does not render that selection decision discriminatory. Moreover, the simple fact that the person selected 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.[23]

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.

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

[23] Although not specifically raised, the grievant's claim of gender discrimination could be analyzed 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.

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.

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Claudia T. Farr
Director