Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: June 14, 2010; Ruling #2010-2657; Agency: Department of Juvenile Justice; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling No. 2010-2657
June 14, 2010

The grievant has requested a ruling on whether his December 1, 2009 grievance with the Department of Juvenile Justice (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant initiated his December 1, 2009 grievance to challenge a selection process in which he competed unsuccessfully. Although he submitted an application, he was not granted an interview. The grievant challenges the screening process, indicating that his application materials demonstrated sufficient qualifications for the position to obtain an interview. During this grievance, the agency re-screened the grievant's application and again found that he should not have received an interview. After the parties were unable resolve the grievance during the management steps, the grievant now requests that his grievance be qualified for a hearing.

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 essentially alleges a misapplication and/or unfair application of policy.[2]

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

[1] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[2] The grievant has also included a statement on his Grievance Form A that the screening could have been "discriminatory." However, it appears that this was originally included in his paperwork in case facts developed that indicated any discrimination. However, the grievant has no evidence of any discrimination and, therefore, is not asserting that anyone has engaged in discriminatory conduct. As such, this claim will not be addressed below as a basis for qualification.

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 his knowledge, skills, and abilities as depicted in his application materials should have demonstrated the minimum qualifications for the job and, therefore, he should have been screened in for an interview. During this grievance, the grievant's application was screened again to determine whether he met the minimum qualifications for the position. While the re-screening determined that the grievant did, in fact, demonstrate certain qualifications that the original screening did not identify, it found other deficiencies. For instance, the agency asserts there was no demonstration of strategic planning experience.

Both the original screening and the re-screening also determined that the grievant did not demonstrate knowledge or experience with new technology for training. The grievant cites his use of certain equipment utilized in his training. While the agency appears to dispute whether the description in his application adequately related that information, even if the grievant had demonstrated proficiencies with such equipment it does not mean that he met what the agency was looking for on that factor. The agency listed experience with e-learning, distance learning, and the Commonwealth's Knowledge Center as items that could fulfill the use of new technology for training, especially based on recent budget reductions. At best, reasonable minds

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[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."

could disagree about whether the grievant demonstrated this new technology qualification on his application. As such, this Department cannot find that the agency's assessment in this regard was arbitrary.

While the grievant may disagree with the agency's assessment, he has not raised a sufficient question as to whether the agency's ultimate screening decision disregarded the facts or was otherwise arbitrary or capricious. As such, this claim 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 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 Farr
Director