Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: August 3, 2010; Ruling #2011-2710; 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. 2011-2710
August 3, 2010

The grievant has requested a ruling on whether her February 9, 2010 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 her February 9, 2010 grievance to challenge a selection process in which she competed unsuccessfully. She argues that she was qualified for the position. She further alleges that she applied for the same position at least two times before and had been determined to be qualified for the position.[1] The grievant also asserts that there may have been a personal relationship between the successful candidate and a member of the interview panel. As such, the grievant asserts that "nepotism" improperly influenced the selection decision. The agency disputes the grievant's claims and reiterates that it selected the better qualified candidate.

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.[2] In this case, the grievant 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

[1] While this grievance is untimely to challenge the two prior selections, which appear to have occurred in 2007 and 2009, *see Grievance Procedure Manual* § 2.4 (requiring grievances to be "presented to management within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the grievance"), the prior selections have been considered as background evidence in this ruling only. Whether the agency followed policy or improperly denied the grievant the position in those prior selections are not issues to be addressed in this ruling.
[2] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

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" in that it appears the position she applied for would have been a promotion.

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.[7] Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[8] 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.[9]

The grievant asserts that she was qualified for the position. However, even if a candidate is determined to be minimally qualified, it does not mean that the candidate is best suited for the position. According to the agency, the successful candidate demonstrated more experience with and knowledge of the particular areas covered by the open position. It appears that the successful candidate was performing many, if not all, of the functions of the position in her current position at the time of the selection. While the grievant appears to have had some experience with some of the duties of the open position, the successful candidate appears to have better demonstrated the knowledge, skills, and abilities needed in the interview. Though the grievant may disagree with the agency's assessment, she has presented insufficient evidence that

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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* Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

[8] Va. Code § 2.2-2901 (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). If an agency were to make a selection decision based on a personal relationship with the candidate, i.e., nepotism, it could potentially run afoul of this requirement.

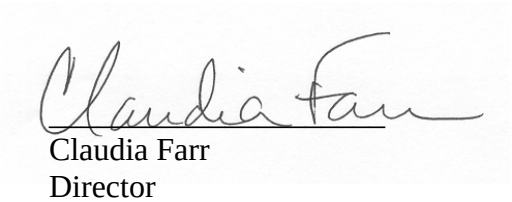
[9] *See Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."

might suggest the agency's selection disregarded the facts or was otherwise arbitrary or capricious.

In sum, in reviewing the relevant selection materials in this case, this Department can find nothing to indicate that the grievant was so clearly the better candidate that the selection of the successful candidate disregarded the facts. Rather, it appears the agency based its decision on a good faith assessment of the relative qualities of the candidates as demonstrated in their respective interviews. As such, there is no indication that any other inappropriate factors, such as a relationship between the selected candidate and a panel member, if any actually existed, affected the determinations. This grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied the applicable selection policies to 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.



Claudia Farr
Director