

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: December 17, 2010; Ruling No. 2011-2838; Agency: Department of Rehabilitative Services; Outcome: Qualified for Hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Rehabilitative Services
Ruling No. 2011-2838
December 17, 2010

The grievant has requested a ruling on whether his June 3, 2010 grievance with the Department of Rehabilitative Services (the agency) qualifies for a hearing. For the following reasons, this grievance qualifies for hearing.

FACTS

The grievant initiated his June 3, 2010 grievance to challenge a selection process for a lead counselor position in which he competed unsuccessfully. Among the grievant's many arguments as to how the selection process was flawed, he asserts that he was more qualified for the position than the successful candidate. The grievant also alleges that preselection and/or retaliation may have played a role in the selection process.

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 numerous claims, including misapplication and/or unfair application of policy as well as retaliation.

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 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."² Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.³ An adverse employment action is defined as a "tangible employment

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

² See *Grievance Procedure Manual* § 4.1(b).

³ 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

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.”⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁵ 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 he 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.⁶ Further, it is the Commonwealth’s policy that hiring and promotions be competitive and based on merit and fitness.⁷ However, 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.⁸

Among the grievant’s allegations that the agency’s selection process was flawed, he argues that the successful candidate did not possess particular certifications, including the Certified Rehabilitation Provider (CRP) certification. The job announcement lists under minimum qualifications for the lead counselor position: “[m]ust also possess a CRP ... or other certification that qualifies them to become a CRP without examination.” Based on the information gathered during the investigation for this ruling, it does not appear that the successful candidate met this requirement at the time of the selection. The grievant has apparently had this certification since 2001. Because it appears that the agency may have selected a candidate for the position who did not possess a required certification, the grievant has raised a sufficient question that the agency’s selection was arbitrary or capricious. Further, selecting a possibly non-qualified candidate over the grievant could potentially support the grievant’s arguments that such issues as preselection and/or retaliation tainted the selection process. As such, this grievance qualifies for a hearing.

This ruling is not meant to indicate that the grievant should have been selected for the position or that the agency engaged in retaliation, preselection, or misapplication of policy. Further, no part of this ruling is meant to suggest that this Department has found sufficient

“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. 2011-2740; EDR Ruling No. 2007-1538.

⁴ Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

⁵ See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁶ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

⁷ Va. Code § 2.2-2901 (stating, in part, that “[i]n accordance with the provisions 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).

⁸ 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.”

evidence to establish the grievant's case. This ruling only determines that there are sufficient questions raised by the facts for the grievance to qualify for hearing.

The grievant has also asserted various claims and theories regarding this selection, including preselection, retaliation, and other flaws in the process. Because the grievant's claim of misapplication of policy as to the selection process 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 June 3, 2010 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

Claudia Farr
Director