Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: April 11, 2011; Ruling No. 2011-2889; Agency: Virginia Employment Commission; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Employment Commission
Ruling No. 2011-2889
April 11, 2011

The grievant has requested a ruling on whether her November 12, 2010 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant initiated her November 12, 2010 grievance to challenge a selection process for a supervisor position in which she competed unsuccessfully. Among the grievant's several arguments as to how the selection process was flawed, she asserts that she believes that nepotism may have tainted the process and appears to argue that she was better qualified than the successful 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.[1] In this case, the grievant alleges 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 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

[1] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[2] *See Grievance Procedure Manual* § 4.1(b).

employment action.[3] 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."[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 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.[6] 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.[7] The grievant's contention that the agency's selection process was flawed appears to be primarily focused on her impression that favoritism must have played a role in the process. She notes that she has 18 years of experience, provides training to staff, and acts on behalf of the manager/supervisor in their absence.

While the grievant asserts that nepotism may have tainted the selection process, she has provided no evidence in support of this contention. The agency has explained that all candidates were treated the same during the hiring process and the grievant offers no evidence to counter the agency's position. The agency notes that the selected applicant has knowledge of Job Service and Unemployment Insurance and came with an endorsement from her former supervisor as having done a very good job there and for being a fast learner. The agency also notes that the selected applicant has prior supervisory experience from her military service. No evidence countering any of these points has been provided to this Department.

While the grievant has many years of experience and has stepped into an interim supervisory capacity on occasion, the agency determined that the successful candidate was the better choice to serve as the new supervisor. Though the grievant may disagree with the agency's assessment, she has presented insufficient evidence that might suggest the agency's selection disregarded the facts or was otherwise arbitrary or capricious. Accordingly, this grievance does not raise a sufficient question as to whether a misapplication and/or unfair application of policy tainted the selection process to qualify for a hearing.

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[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 "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.

[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* DHRM Policy No. 2.10, *Hiring*.

[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."

Mediation

Finally, although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue as to some of the issues that could be ongoing. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, the parties should call 888-232-3842 (toll free) or 804-786-7994.

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