

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date:
April 20, 2011; Ruling No. 2011-2943; Agency: Department of State Police;
Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2011-2943
April 20, 2011

The grievant has requested a ruling on whether his February 17, 2011, grievance with the Department of State Police (“agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Senior Trooper with the Department of State Police. In January 2011, the grievant was offered a promotion, contingent upon the grievant’s compliance with the agency’s weight control program. On January 20, 2011, the agency’s nurse practitioner calculated the grievant’s maximum allowable weight as established by the “Girth method” in order to determine his compliance with the agency’s weight control program. According to the results, the grievant exceeded his maximum allowable weight; hence, the agency rescinded the promotion offer. Several days later, the grievant was offered a second promotion, but once again the offer was contingent upon the grievant’s compliance with the agency’s weight control program. Similarly, the grievant was weighed and disqualified for the promotion because he exceeded his maximum allowable weight.

The grievant alleges that the agency unfairly applied the promotion and weight control policies in that he was picked as the top candidate for two promotions, but was disqualified for both based solely upon his weight and appearance. In addition, the grievant contends the agency’s policies, which allow the agency to place an overweight employee on the weight control program, were misapplied because the agency failed to provide the time or means for him to actually accomplish the weight loss goals. Finally, the grievant asserts that the agency’s decision to disqualify him as a candidate from promotion based solely on compliance with the weight control program was arbitrary and capricious. The February 17th grievance proceeded through the management resolution steps without resolution and was denied qualification by the agency on March 17, 2011. The grievant now seeks a qualification determination from this Department.

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.¹ By statute and under the grievance procedure, the contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, as well as the work activity accepted by an employee as a condition of employment or which reasonably may be expected to be part of the content of the job, “shall not proceed to a 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 argues the agency misapplied and unfairly applied its promotion and weight control policies.

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.”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 An adverse employment action occurred in this case because the grievant was denied promotion.

Pursuant to agency policy, all sworn employees undergo an annual physical survey; one aspect of which is to check the employee’s weight.⁷ General Order 14.11 states all “employees shall control their weight in relation to their height.”⁸ Accordingly, maximum weight limits are not to be exceeded.⁹ Policy states that “employees are encouraged to adopt a medically accepted method of diet and exercise” in order to fulfill these requirements.¹⁰

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

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

⁷ Virginia Department of State Police, General Order ADM 14.11, Physicals and Annual Surveys, §3.

⁸ *Id.* at §8.

⁹ *Id.*

¹⁰ *Id.*

Obtaining an employee's weight is necessary to determine if he or she is eligible for a promotion within the agency. General Order 8.00 establishes the agency's promotion policies and procedures, and states that the promotion of a sworn employee shall be based on job-related qualifications and performance as demonstrated by: (1) promotional examinations, if any; (2) willingness to assume duties of higher rank at a specific location; (3) performance evaluation; (4) adherence to discipline; and (5) compliance with the weight control program.¹¹ To be eligible for a promotion, policy states all sworn employees must be in compliance with the weight control standards unless there is an underlying medical problem certified by the agency's physician.¹² Candidates eligible for promotion are weighed and if they exceed their weight table, they are subsequently referred to the agency's nurse practitioner to calculate their maximum allowable weight, as established by the "Girth method."¹³ Candidates who exceed their maximum allowable weight are not promoted.¹⁴

General Order 14.12 describes the agency's weight control program.¹⁵ When an employee exceeds his weight table and his maximum allowable weight as established by the "Girth method," the employee is assigned to the agency's weight control program.¹⁶ As part of that program, the employee is weighed each month by his or her supervisor.¹⁷ The employee is expected to make progress towards his or her maximum allowable weight at a rate of two pounds per month.¹⁸ At the end of four months, the employee is expected to have either met his or her maximum allowable weight or to have lost eight pounds; those who fail to meet that standard are not in compliance with the weight control program.¹⁹ General Order 14.12 also reiterates that an employee shall not exceed their maximum allowable weight at the time of promotion.²⁰

Policy is very clear that to be eligible for promotion a candidate must be in compliance with the weight standards. Furthermore, policy does not require the agency to provide the time or means to accomplish weight loss goals, but rather states that it is an employee's responsibility to control his or her weight in relation to height and to not exceed the maximum allowable weight. The grievant admits he was aware of these policies when he accepted his position and agrees that the policies are applied consistently among all employees. In light of the clear content of the applicable policies, and the grievant's admission that the policies are consistently applied, this Department cannot find that the agency misapplied or unfairly applied its policies with respect to the grievant.²¹

¹¹ Virginia Department of State Police, General Order ADM 8.00, Promotion §2.

¹² *Id.* at §11.

¹³ *Id.* at §11(b).

¹⁴ *Id.* at §11(c).

¹⁵ Virginia Department of State Police, General Order ADM 14.12, Weight Control Program.

¹⁶ *Id.* at §1.

¹⁷ *Id.* at §2.

¹⁸ *Id.* at §2(a).

¹⁹ *Id.* at §2(b).

²⁰ *Id.* at §8.

²¹ We note as well that claims that relate solely to the *content* of policies cannot qualify for hearing. Va. Code § 2.2-3004(C)(iii); *Grievance Procedure Manual* § 4.1(c).

The grievant also asserts that the policies themselves are unfair, arbitrary and capricious because some employees have the ability to starve themselves and lose the weight quickly to come into compliance for promotion eligibility, but then after they receive the promotion, they gain the weight back without any consequence of losing the promotion.

As stated previously however, claims such as this, which essentially challenge the *content* of policies, cannot be qualified for hearing.²² Further, by itself, the fact that another officer may have the ability to lose weight faster than the grievant does not support a finding of arbitrariness or raise a sufficient question as to whether an unfair application of policy has occurred. While the grievant may disagree with the agency's policy and rationale for the promotional process, such disagreement cannot proceed to 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 this Department's 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 T. Farr
Director

²² Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c)