

Issues: Qualification - Compensation (Promotion) and Discrimination (Religion and National Origin); Ruling Date: August 10, 2011; Ruling No. 2011-3015; 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 No. 2011-3015
August 10, 2011

The grievant has requested a ruling on whether his March 9, 2011 grievance with the Department of State Police (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant initiated his March 9, 2011 grievance to challenge the agency's denial of his request to convert to a Trooper position from his current position as a Commercial Vehicle Enforcement Officer (CVEO). The grievant argues that he is more qualified and better educated than other CVEOs whose conversion requests were approved. The grievant additionally challenges the agency's denial on the basis of discrimination. The agency states that the grievant's request was denied due to the grievant's alleged instances of poor judgment and failure to accept direction by superiors, for which he had been counseled.

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 a misapplication and/or unfair application of policy and discrimination.

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

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 "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.

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 he sought, at a minimum, would have enabled better opportunities for promotion.

Misapplication of Policy 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. The conversion process at issue in this case was a one-time occurrence that does not appear to be governed by a specific state or agency policy, and none has been cited in the grievance materials. Generally speaking, it is the Commonwealth’s policy that hiring and promotions be competitive and based on merit and fitness.⁶ However, the grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of applicants during a selection or promotion process. Thus, a grievance that challenges an agency’s action like the denied conversion request 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 he was well-qualified for the position. This Department has no basis to dispute the grievant’s argument in this regard. However, it also appears that the agency denied the grievant’s request based on a reasonable review of the grievant’s conduct. It appears that the grievant had been counseled about certain instances of poor judgment and failure to accept direction from superiors. The agency considers such issues to be important to the duties of a Trooper. Consequently, the grievant’s request was denied. Although the grievant may reasonably disagree with the agency’s assessment, this Department has reviewed nothing that would suggest the agency’s determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Further, this Department has reviewed information about other similarly situated CVEOs in relation to their conversion requests. No information was discovered that would suggest any other CVEO with a performance history involving a similar level of counseling as the grievant’s, and in a division or region near the grievant’s, was given permission to convert to Trooper.

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 Va. Code § 2.2-2901 (stating, in part, that “in 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).

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.”

The grievant has presented insufficient evidence that might suggest the agency's determination disregarded the facts or was otherwise arbitrary or capricious. Rather, it appears the agency based its decision on a good faith assessment of the grievant. This grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied the applicable selection policies, thus it does not qualify for a hearing.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination.⁸ To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.⁹

In this case, the grievant has asserted religion and/or national origin grounds for his discrimination claim, however, there is no evidence that religion and/or national origin had any causal relationship with the agency's decision. While the grievant points to issues in the past that may have been perpetrated by his co-workers to support his discrimination claim, the cited evidence does not raise a sufficient question as to whether the denied conversion request was the result of discrimination. Further, as noted above, the agency's determination appears to have been based on a reasonable evaluation of the grievant's conduct. Because there is no indication that the agency's non-discriminatory reasons for the denied conversion request were pretextual, the grievant's claims of discrimination do 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.

Claudia Farr
Director

⁸ See *Grievance Procedure Manual* § 4.1(b).

⁹ See *Hutchinson v. INOVA Health System, Inc.*, C.A. No. 97-293 A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).