

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: September 26, 2011; Ruling No. 2012-3082; Agency: Department of Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2012-3082
September 26, 2011

The grievant has requested a ruling on whether her June 8, 2011 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant initiated her June 8, 2011 grievance to challenge two selection processes in which she competed unsuccessfully: a senior probation officer position and a deputy chief position. She argues that she was better qualified than the successful candidates. The grievant also believes that the agency has discriminated against her on the basis of a disability.¹ The grievant states that she was told by the hiring authority, in an after-the-fact discussion about the selection, that the grievant had been out “a lot” with medical issues, there had been a lot of changes, and there were some technical issues she needed to remember. The agency disputes the grievant’s claims and reiterates that it selected the best-suited candidates based on the applicable recruitment information. The agency states that the grievant’s disability status was not considered at all.

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 discrimination, and, essentially, a misapplication and/or unfair application of 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

¹ The grievant states she was diagnosed with a disease.

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

³ See *Grievance Procedure Manual* § 4.1(b).

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” as to this grievance in that it appears the positions she applied for would have been promotions.

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. 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 Moreover, 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

The grievant asserts that she was more qualified than the successful candidates. However, the individual selected for the senior probation officer position had about eight more years of experience as a probation officer than the grievant. Similarly, the individual selected for the deputy chief position had about five more years of experience as a probation officer than the grievant. In reviewing the agency’s applicant evaluation forms, it appears that both of the successful candidates were rated higher than the grievant. In addition, the panel rated the successful candidate’s interview for the senior probation officer position much better than the grievant’s interview.

While the grievant may disagree with the agency’s assessments, she has presented insufficient evidence to suggest that the agency’s selection decisions disregarded the facts or were otherwise arbitrary or capricious. Indeed, in reviewing the candidates’ application materials, this Department can find nothing to indicate that the grievant was so clearly the better

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 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.”

candidate that the selection of the successful candidates disregarded the facts. Rather, it appears the agency based its decision on a good faith assessment of the relative qualities of the candidates.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination.⁹ 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.¹⁰

Although the grievant alleges discrimination on the basis of a disability, there is no evidence that her diagnosis had any causal relationship with the selection decisions. Indeed, the statements described by the grievant to support her claim merely mention the fact that she had been absent and had some changes to catch up on. Such evidence fails to raise a sufficient question as to whether the agency's selection determinations were the result of discrimination. Further, as noted above, the agency's selections of the successful candidates appear to have been based on reasonable evaluations of the candidates' knowledge, skills, and abilities. In addition, since the filing of this grievance, the grievant has since attained a promotion to senior probation officer. Such a promotion would not likely be forthcoming if the agency held a discriminatory view of the grievant and her condition. Because there is no indication that the agency's non-discriminatory reasons for the selection 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

⁹ See *Grievance Procedure Manual* § 4.1(b).

¹⁰ 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).