Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: November 8, 2011; Ruling No. 2012-3123; 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 2012-3123
November 8, 2011

The grievant has requested a ruling on whether his August 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 August 9, 2011 grievance to raise concerns about his elimination from the canine training program. In the grievance attachment, the grievant described his progress through the course. The grievant asserts that he was ultimately either set up to fail with dogs who were no longer best suited to perform the duties assigned or because the agency employees evaluating him were determined to eliminate him. Thus, the grievant asserts that his performance during training was arbitrarily and capriciously evaluated. The agency states that the grievant was eliminated from the program because it was determined that he was not a good fit for the job. According to the agency, the dogs assigned to the grievant "shut down" on him and the grievant was unable to develop or demonstrate the requisite relationship and/or demeanor to work as a canine handler.

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 essentially alleges 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

[1] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c). Although the grievant also refers to his evaluation in the training program generally as "discriminatory practices," there is no indication that his claim is based on any protected status, such as those listed in DHRM Policy 2.30. Because there is no actual claim of discrimination as recognized under the grievance procedure, it will not be discussed further in this ruling.

employment actions."[2] For purposes of this ruling only, it will be assumed that the grievant has alleged an "adverse employment action."[3]

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 grievant has not cited to any policy provisions violated by the agency. Generally speaking, however, it is the Commonwealth's policy that hiring and promotions, to the extent the grievant's evaluation during the training program can be considered similarly, be competitive and based on merit and fitness.[4] Further, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of employee performance in situations such as those at issue in this grievance. Thus, a grievance that challenges an agency's action like the grievant's elimination from the canine training program 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.[5]

The grievant clearly argues that he was evaluated unfairly and believes he was successful during the training program. However, the agency evaluated the grievant's performance during the program as insufficient to perform successfully in a canine position. 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. Indeed, the basis for the grievant's elimination seems reasonable as the ability to develop good working relationships with the dogs would be crucial to the position. Agency decision-makers deserve appropriate deference in making such performance-based determinations.

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 employees based their determinations on good faith assessments of the grievant. This

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[2] *See Grievance Procedure Manual* § 4.1(b). However, 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

[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." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment. *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

[4] 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).

[5] *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."

grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy or as to whether the grievant was subject to arbitrary or capricious review, thus it does not qualify for a hearing.[6]

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

[6] The grievant also pointed out that another trainee that did not pass the course was given an additional opportunity to train and pass that the grievant did not receive. However, this other individual was not an agency employee, but rather the employee of a locality. Consequently, there is no basis to find that the grievant was treated differently than other similarly situated agency employees based on this additional fact.