Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: February 3, 2012; Ruling No. 2012-3212, 2012-3233; 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 Numbers 2012-3212, 2012-3233
February 3, 2012

The grievant has requested a ruling on whether his two October 15, 2011 grievances with the Department of Corrections (the agency) qualify for a hearing. For the following reasons, these grievances do not qualify for hearing.

FACTS

The grievant initiated his October 15, 2011 grievances to challenge two selection processes (a Corrections Sergeant position and a Corrections Lieutenant position) for which he submitted applications but was not granted an interview. The grievant was screened out because he left at least one portion of his application blank. The application was missing information concerning a description of his duties for his work with the agency as a Corrections Officer. The grievant asserts that the agency has misapplied policy and that he has been discriminated against on the basis of his service in the Army Reserves.

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 discrimination and 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."[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

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" as to these grievances in that it appears the positions he 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. 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.[6]

State hiring policy allows an agency to reduce the applicant pool by screening applications.[7] "The agency must screen applications according to the qualifications established for the position and must apply these criteria consistently to all applicants."[8] The screening process is, therefore, a review of an applicant's application to determine whether, for example, the applicant meets the minimum requirements for the position and/or demonstrates substantial knowledge, skills, and abilities to be considered a part of the interview group. Consequently, the information contained on the application is crucial to screen an applicant.

For example, one of the requirements for the Corrections Sergeant position is "working knowledge and understanding of correctional policies, procedures and practices." The only portion of the grievant's application that would demonstrate this job competency would be his prior work with the agency. However, the portion of his application that would describe his knowledge, skills, and abilities in this area was blank. While an agency might be able to infer from the fact that an applicant is/was an employee of the agency that he/she could demonstrate working knowledge of such correctional policies, procedures, and practices, this Department has reviewed no mandatory policy provision that would require such an inference be made at screening. There is no provision in policy that has been violated by screening the grievant's

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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 Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."

[7] *See* Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

[8] *Id.*

application out when there was no information on the application from which the agency could, for example, assess the grievant's competencies regarding correctional policies, procedures, and practices.[9]

While the grievant may disagree with the agency's determination, he has presented insufficient evidence that might suggest the agency's decision to screen out his application 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's application. We can find no misapplication of policy by the agency screening out an incomplete application, especially where the missing information was critical to the sought positions.[10]

Discrimination – USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA)[11] prohibits an employer from discriminating against a member of the armed forces. A person cannot be "denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer" based on the employee's membership in a "uniformed service."[12] A benefit of employment is defined by the Act as:

> any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.[13]

Moreover, an employer shall be considered to have violated USERRA only if the employee's military status was a motivating factor in the employer's action, and the action would not have been taken in the absence of such a military status.[14] If the employee establishes that his military status was a motivating factor in the employer's action, USERRA shifts the burden of proof to the employer to show that the action would have been taken anyway, in the absence of his military status.[15]

To qualify for a hearing, the grievance must also present evidence raising a sufficient question as to (i) whether the grievant's military status was a "motivating factor" in the agency's

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[9] Demonstrating such competencies would be understandably a relevant consideration as to the Corrections Lieutenant position as well.

[10] While the state hiring policy allows an agency to request clarification and follow-up information from an application, there is no policy provision requiring the agency to do so. *See* DHRM Policy 2.10.

[11] 38 U.S.C. §§ 4301 et seq.; *see also* Executive Order 6; DHRM Policy 2.05, *Equal Employment Opportunity*.

[12] 38 U.S.C. § 4311(a) (emphasis added). "Uniformed service" includes the Armed Forces and National Guard. 38 U.S.C. § 4303(16).

[13] 38 U.S.C. § 4303(2).

[14] 38 U.S.C. § 4311(c)(1).

[15] Hill v. Michelin N. Am., Inc., 252 F.3d 307, 312 (4th Cir. 2001)

determination, and if so, (ii) whether the agency would not have made the same determination in the absence of his military status.[16] However, there is no indication that the grievant's status as a member of the Army Reserves was any factor, much less a motivating factor, in the decision not to grant the grievant an interview for either the Corrections Sergeant or the Corrections Lieutenant positions. Rather, as discussed above, the determinations were made solely on the basis that the grievant's applications were incomplete and missing pertinent information to properly screen him for the positions. Indeed, it appears that the grievant has recently corrected his application and applied for another open Corrections Lieutenant position, for which he has been granted an interview. Because there is no indication that the agency's non-discriminatory explanation for the screening decisions 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.

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Claudia Farr
Director

[16] *See id.*