

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: February 8, 2012; Ruling No. 2012-3226; Agency: Department of Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3226
February 8, 2012

The grievant has requested a ruling on whether his September 13, 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 his September 13, 2011 grievance to challenge a selection process in which he competed unsuccessfully. Principally, the grievant argues that one of the members of the interview panel had a familial relationship (former mother-in-law) with the selected candidate. The selected candidate was formerly married to the panel member's step-son, but they divorced ten years ago. The agency denies that this relationship caused any conflict to arise and states that no provision of the agency's policy would have prohibited the panel member's involvement based on the familial relationship. The agency also states that this panel member merely assisted the ultimate hiring authority, the Warden, in making the selection decision. The Warden maintains that it was his decision alone. The grievant also argues that he was better qualified than the successful candidate.

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 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

¹ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

² See *Grievance Procedure Manual* § 4.1(b).

whether the grievant has suffered an adverse employment action.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.”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 this grievance in that it appears the position he applied for would have been a promotion.

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.⁶ 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.⁷

This Department has reviewed no policy provision, and the grievant has presented none, that would have rendered the panel member’s involvement in the interview process improper. Indeed, the alleged relationship between this panel member and the selected candidate is so extended and tenuous that it can hardly be said to give rise to an apparent conflict of interest. Further, the fact that the ultimate hiring decision was the Warden’s⁸ renders the grievant’s argument about this other panel member essentially immaterial.

The grievant also asserts that he was more qualified than the successful candidate. Although the grievant may reasonably disagree with the agency’s assessment of him as a candidate in relation to the selected candidate, this Department has reviewed nothing that would suggest the agency’s determination disregarded the pertinent facts or was otherwise arbitrary or capricious. For example, the selected candidate has had more years of experience in the field of

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.

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 Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

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.”

⁸ The agency’s argument is supported by the documentation reviewed. It appears that both of the other panel members, including the panel member who allegedly had a conflict, recommended the grievant for the position. The Warden, however, did not recommend the grievant and selected a different candidate.

psychiatric treatment. In reviewing the application and interview materials, this Department can find nothing to indicate that the grievant was so clearly the better candidate such that the selection of the successful candidate disregarded the facts. Rather, it appears the agency based its decision on a good faith assessment of the relative qualities of the candidates. This grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied the applicable selection policies to 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