

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: August 1, 2012; Ruling No. 2012-3369; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**QUALIFICATION RULING**

In the matter of Virginia Department of Transportation  
Ruling Number 2012-3369  
August 1, 2012

The grievant has requested a ruling on whether his April 9, 2012 grievance with the Virginia Department of Transportation (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant initiated his April 9, 2012 grievance to challenge the agency's selection process for a Transportation Operations Manager III position in which he competed unsuccessfully. He argues that he was better qualified than the successful candidate. The grievant also believes that the agency's hiring manager discriminated against him.<sup>1</sup> The grievant states that he was told by the hiring manager that the selected candidate had taken some management and leadership skills courses, which the hiring manager argued made the selected candidate more qualified for the Transportation Operations Manager III position. The grievant states that he completed the same training and has supervised several area headquarters employees for twenty-five years with the agency, and hence, he alleges he was more qualified for the Transportation Operations Manager III position. The agency disputes the grievant's claims and reiterates that it selected the best-suited candidate based on the applicable recruitment information.

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.<sup>2</sup> In this case, the grievant alleges discrimination, and, essentially, a misapplication and/or unfair application of policy.

---

<sup>1</sup> The grievant alleges the hiring manager displayed favoritism.

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

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>3</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>4</sup> 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.”<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup> 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.

*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.<sup>7</sup> 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.<sup>8</sup>

The grievant asserts that he was more qualified than the successful candidate. However, the individual selected for the Transportation Operations Manager III position had about five years of progressive supervisory experience whereas the grievant continuously held his current position as Transportation Operations Manager I since 1978. Similarly, the individual selected for the Transportation Operations Manager III position had more contract development, contract monitoring, and contract management experience than the grievant.<sup>9</sup> In reviewing the agency’s applicant evaluation forms, it appears that the successful candidate was rated significantly higher than the grievant. In addition, the panel recommended the successful candidate for further consideration whereas the panel did not recommend the grievant.

---

<sup>3</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> 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, EDR substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

<sup>5</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>7</sup> See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

<sup>8</sup> 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.”

<sup>9</sup> The agency’s Interview Summary Form stated the grievant “has some experience with monitoring budget reports.”

While the grievant may disagree with the agency's assessments, he has presented insufficient evidence to suggest that the agency's selection decision disregarded the facts or was otherwise arbitrary or capricious. Indeed, in reviewing the candidates' application materials, EDR can find nothing to indicate that the grievant was so clearly the better candidate 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 both candidates. As such, the grievance does not raise a sufficient question as to whether the agency misapplied or unfairly applied the applicable selection policies to qualify for hearing.

### *Discrimination*

Grievances that may be qualified for a hearing include actions related to discrimination.<sup>10</sup> 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.<sup>11</sup>

Although the grievant alleges discrimination on the basis that the hiring manager displayed favoritism during the hiring process, there is no evidence that his allegation had any causal relationship with the selection decision. A mere allegation fails to raise a sufficient question as to whether the agency's selection determination was the result of discrimination. Further, as noted above, the agency's selection of the successful candidate appears to have been based on a reasonable evaluation of the candidate's knowledge, skills, and abilities. Because there is no indication that the agency's non-discriminatory reasons for the selection was pretextual, the grievant's claim of discrimination does not qualify for a hearing.

### APPEAL RIGHTS AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.<sup>12</sup> The nonappealability of such rulings became effective on July 1, 2012. Because the instant grievance was initiated prior to that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt 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 former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. If the court should qualify this grievance, within five workdays of receipt of the court's decision,

---

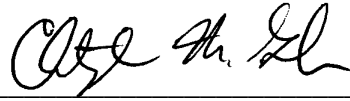
<sup>10</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>11</sup> 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).

<sup>12</sup> Va. Code § 2.2-1202.1(5).

August 1, 2012  
Ruling No. 2012-3369  
Page 5

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.



---

Christopher M. Grab  
Senior Consultant  
Office of Employment Dispute Resolution