

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: September 14, 2012; Ruling No. 2012-3423; 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 the Virginia Department of Transportation  
Ruling Number 2013-3423  
September 14, 2012

The grievant has requested a ruling on whether his April 12, 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 12, 2012 grievance to challenge the agency's selection process for a Contract Monitor position in which he competed unsuccessfully. During the hiring process, the agency's selection panel interviewed fourteen candidates via telephone, asking the same series of questions to each candidate. The panel utilized the candidate's answers to determine which candidates would be best qualified for a subsequent in-person interview. Following a phone interview, the panel decided not to refer the grievant for an in-person interview. The grievant argues that the agency's hiring manager displayed favoritism in the hiring process and that he was better qualified than the successful candidate. The agency disputes the grievant's claims and asserts 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>1</sup> 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 employment actions."<sup>2</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action

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

<sup>2</sup> See *Grievance Procedure Manual* § 4.1(b).

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>3</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>4</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.

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 a specific mandatory provision of policy that was allegedly violated. However, 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>5</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>6</sup>

Here, the grievant asserts that he was more qualified than the successful candidate and that he should have received an in-person interview for this position. In order to assess which candidates received in-person interviews following the phone screening, the agency’s interview panel members completed a “Phone Screening” evaluation form following each call. The Phone Screening form set forth three major areas upon which the candidates were to be evaluated: Computer Program Use, Maintenance/Construction, and Contract Monitoring. Notes were made by each panel member regarding the specifics of the candidates’ responses in each category, and the candidates were ultimately assessed as either “Not Competitive,” “Minimally Qualified,” “Potentially Competitive,” or “Highly Competitive” in each of the three areas.

While the successful candidate was rated as “Highly Competitive” in each of the three assessed areas, the grievant’s ratings were “Not Competitive” in the area of Computer Program Use and “Potentially Competitive” in the areas of Maintenance/Construction and Contract Monitoring. With respect to the use of computer programs, the panel members noted that the grievant mentioned experience with equipment spreadsheets, some small EQ-429 diagrams, emails and sending photos. One panel member noted that grievant stated he had “not been [on a] computer in a while.” In contrast, the successful candidate described experience as a fiscal tech for five and a half years, utilizing specific computer programs at the agency such as Access, Word, Cedar, SWAS, FMS II and Excel to track traffic, leave, time spent on jobs, pay invoices,

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<sup>3</sup> Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

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

<sup>5</sup> See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

<sup>6</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.”

and approve employees' time and leave taken. Furthermore, it appears that the grievant's response regarding his experience in the area of Contract Monitoring lacked key elements that would demonstrate his knowledge and understanding of that type of work, as one panel member noted that the answer was "not strong in monitoring." Rather, the grievant's response to this question appears to have focused on his experience performing construction and maintenance work. In contrast, both individuals on the phone interview panel recorded in their notes that the individual selected for the Contract Monitor position described that he had spent the past year and a half performing the duties of the Contract Monitor. The panel recommended the successful candidate for further consideration following the phone interview, whereas the panel did not recommend the grievant.

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 qualified or the better candidate for the Contract Monitor position that the denial of an in-person interview with him 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.

#### APPEAL RIGHTS AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.<sup>7</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, 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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<sup>7</sup> Va. Code § 2.2-1202.1(5).