

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: December 4, 2012; Ruling No. 2013-3436; Agency: Department of Alcoholic Beverage Control; Outcome: Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2013-3436
December 4, 2012

The grievant has requested a ruling on whether his July 16, 2012 grievance with the Department of Alcoholic Beverage Control (the “agency”) qualifies for a hearing. In EDR Ruling Number 2013-3404, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management declined to qualify the grievance for a hearing. The grievant requested that EDR reconsider that ruling. For the following reasons, EDR has reconsidered its ruling in this matter and now determines that the grievance qualifies for hearing.

Though the grievant’s request for reconsideration also challenged some of EDR’s factual assumptions, the facts pertinent to this reconsidered ruling are largely undisputed. In November 2011, the grievant was temporarily elevated from his Assistant Special Agent in Charge (ASAC) position to the Acting Special Agent in Charge (SAC) position in the agency’s S region. At that time, the grievant alleges the Enforcement Division Director informed the grievant that the S region SAC position “would be posted in the near future and that he would have an opportunity to apply for the position on a permanent basis.” However, SAC T from the L region was reassigned to the SAC position in the S region instead of filling the position through a competitive recruitment.

Misapplication and/or Unfair Application of Policy

As discussed in EDR Ruling Number 2013-3404, a central question to the grievant’s claims that the agency misapplied policy, specifically General Order 14, is whether the reassignment of SAC T to the S region was a voluntary or involuntary transfer. The agency’s General Order 14 states that when a SAC requests a voluntary transfer to another region, such a vacancy “shall” be filled by a process of interested individuals submitting applications for the posted position. The grievant states he was told that SAC T was asked if he would like to transfer to the S region, which the grievant felt indicated a voluntary transfer request. As discussed in the prior ruling, the alleged statement by SAC T does not necessarily support that conclusion.¹ As such, EDR declined to qualify the grievance for a hearing.

¹ See EDR Ruling No. 2013-3404.

The grievant has submitted additional information, however, that he became aware of since the prior ruling. The grievant states that certain agency employees in other regions were contacted by SAC T prior to the transfer for them to “lobby” for SAC T’s reassignment to the S region. For EDR Ruling Number 2013-3404, it was our understanding that the reassignment to the S region was a move presented to SAC T by management, i.e., not a voluntary transfer request submitted by SAC T.² However, if the grievant’s facts are accurate, they could lend support to the argument that it was SAC T’s desire to be reassigned to the S region, which could implicate the language in General Order 14 that suggests a competitive recruitment is required.

Upon further consideration of these facts, we are inclined to reverse the prior ruling and qualify this grievance for a hearing. It must be stressed that the original ruling was an incredibly close call. The grievant raised significant questions as to how this matter was handled by the agency. With the additional facts coming to light, there are disputed issues of fact such that we are unable to unequivocally state that there has been no misapplication or unfair application of policy here.

EDR does not reverse its rulings very often and this result is an exceptional case. Further, we are doing so mindful of the fact that General Order 14 provides that the agency “reserves the right to transfer or reassign any and all personnel.”³ This policy language (and other policies noted in EDR Ruling Number 2013-3404) is supportive of the agency’s case and could, at hearing, be a determining factor in the ultimate resolution in this case. However, the grievant also presented information that an original intent behind the enactment of General Order 14 was to give employees in each region the fair opportunity to compete for vacant SAC and ASAC positions, which open so rarely, rather than filling them with outside candidates through a reassignment. In short, there are disputed issues of fact and policy in this case supporting both sides; but a sufficient question of a policy misapplication has been duly raised.

Other Grounds in Reconsideration Request

The grievant’s attorney has made numerous claims in his request for reconsideration and other documents submitted to this agency, many of which question the appropriateness of EDR’s conduct in this case. EDR disputes most, if not all, of the claims made as to its handling of the original ruling request. However, because that ruling has essentially been reversed and this matter will now proceed to hearing, we view the claims to be largely moot for purposes of the qualification ruling request. As such, they will not be addressed further here.

Alternative Theories and Claims

Because the issue of misapplication and/or unfair application of policy qualifies for a hearing, EDR deems it appropriate to send any alternative theories and claims related to these actions and properly the subject of the grievant’s grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. Claims raised

² See *id.*

³ See Virginia Department of Alcoholic Beverage Control Bureau of Law Enforcement General Order 14(III)(G), Transfer Requests, effective July 1, 2009, at 2.

after the grievance was first initiated are not appropriate for consideration at hearing⁴ and are not qualified.

CONCLUSION

For the reasons discussed above, based on the totality of the circumstances, the grievant has raised at least a sufficient question as to whether policy has been misapplied or unfairly applied in this case. This ruling in no way states that the agency has acted improper in any way, only that further exploration of the facts by a hearing officer is appropriate. A hearing officer is more properly suited to examine the disputed issues of fact and interpret the policies involved to rule on the grievant's claims. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing using the Grievance Form B.



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁴ See Grievance Procedure Manual § 2.4 (“Once the grievance is initiated, challenges to additional management actions or omissions cannot be added.”).