



JANET L. LAWSON
DIRECTOR

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

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2024-5667
April 19, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether his November 3, 2023 grievance with the Virginia Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On October 6, 2023, the grievant interviewed by phone for an Investigator Supervisor position within the Drug Task Force division at the agency.¹ The selection panel ultimately decided to not recommend the grievant for a second interview. On or about November 3, 2023, the grievant initiated a grievance alleging that the selection panel was not properly composed of law enforcement officers, and that because they were allegedly not sufficiently experienced in the grievant’s line of work, they “did not understand the value of what was being relayed to them by applicants.” The grievant adds that of the three panelists, only one did not recommend him, but that panelist did not give any reasoning in the interview notes as to why exactly they chose not to recommend him. He essentially argues that it was a misapplication of hiring policy to not include documentation of the reason for not recommending him.

The grievant adds that he was exceptionally qualified for the position. In his grievance he goes into detail of his related experience, including having nine years of Drug Task Force experience, approximately nine years of Virginia State Police experience, and recent accomplishments with the Special Investigations Unit, such as leading multiple investigations and being commended by the Secretary of Public Safety for his work on a particular case that spanned through several jurisdictions. In contrast, he argues that of the three people selected for the second round, one was well-qualified, but the other two had less agency experience than him combined, and one of those two was someone he trained at one point.

¹ The exact title of the position is somewhat inconsistent throughout the record, being referred to as “Assistant Chief” in the step responses, but because “Investigator Supervisor” is the official title on the applicant interview notes, EDR will refer to the title as “Investigator Supervisor.”

Finally, the grievant alleges that pre-selection was potentially the reason for this outcome. In support of this, the grievant mentions a conversation he had with someone in his chain of command who was asking if he knew of anyone interested in the position and also named one of the eventual finalists. He also mentioned a conversation he had with that same finalist after applications were submitted, noting their discussion about how they both wanted the position.

Following the management resolution steps, the agency head determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of agency policy had occurred regarding the decision to not recommend the grievant for the second interview. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency “shall not proceed to a hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.² Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an “adverse employment action.”³ For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action, in that it appears the position he applied for would have been a promotion.

Selection Panel

Some of the grievant’s allegations throughout his grievance relate to the makeup of the selection panel itself. In particular, he alleges that none of the panelists were law enforcement officers, a role the grievant argues is essential to know what is required for the position, and therefore essentially argues that not including panelists of such a role is a misapplication of policy.

DHRM Policy provides the following guidance as to how a selection panel should be composed:

“[P]anel members must . . . represent a diverse population; become familiar with the basic responsibilities of the position for which they will interview applicants; receive appropriate training, instruction or guidance on lawful selection before participation in the interview and selection process; and hold confidential all information related to the interviewed applicants and the recommendation or selection. Normally classified employees panel members should be in the same or a higher role or job class title than the position being filled (unless they are participating as human resource professionals or individuals with a particular expertise required for the position.)”⁴

² Va. Code § 2.2-3004(C); see *Grievance Procedure Manual* §§ 4.1(b), (c).

³ *Grievance Procedure Manual* § 4.1(b).

⁴ DHRM Policy 2.10, *Hiring*, at 11-12.

It is clear from the relevant state policy that the selection panel must have the necessary background to determine who will fill the particular role and should include members of similar or higher role or job class title than the position being filled. The agency has stated in the first-step response that “[t]he selected panel members were approved by Human Resources and the panel was comprised of two former Wardens with considerable experience, one of which currently supervises the intelligence unit of the department.” The third panelist supervises three other units within the relevant division. Further, in the second-step response, the agency provided their own policy provision that mirrors DHRM Policy 2.10, noting that all three members fit the criteria of (1) having knowledge of at least one important aspect of the responsibilities of the position being filled, and (2) being of the same or higher level as the vacant position.

Throughout his responses to the management step responses, the grievant contends that the noted experience of these panel members still does not correlate to having law enforcement experience. Specifically, he states that they “did not complete a DCJS law enforcement academy, they do not have the authority to enforce violations, they do not investigate complex crimes, obtain search warrants, or coordinate with Commonwealth’s Attorney’s to secure prosecution.” He also disagrees with the agency’s assertion that the panelists’ law enforcement experience is a matter of opinion.

After a thorough review of the record, EDR cannot find a sufficient question being raised from this evidence that the agency misapplied policy in composing its selection panel. While the grievant contends that the panelists did not have certain required experience, DHRM Policy 2.10 does not explicitly require a certain level of experience beyond what the agency deems necessary to sufficiently evaluate the candidates. Here, the agency confirmed that all three of the panelists were familiar with the responsibilities of the positions being hired for, and all have the same or higher role or job class title as the vacancy. While it is understandable that the grievant would expect panelists to have certain expertise and training related to the role, the specific expertise he argues is necessary is not a requirement of DHRM or agency policy. Accordingly, nothing in the evidence provided by the grievant or agency suggests a misapplication of policy regarding the composition of the selection panel such that qualification for a hearing is warranted.

Selection Panel Members’ Recommendations

The grievant contends that the agency also misapplied policy in their decision to not recommend him for the second stage of interviews because the one panelist who did not recommend him did not provide any rationale in their interview documentation, or otherwise any negative feedback that would support the decision. The grievant also generally alleges that the agency misapplied and/or unfairly applied state and agency policy by not selecting him for the Investigator Supervisor position because he was the most qualified candidate for the position in comparison to the candidates selected as finalists. 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.⁵ Moreover, the grievance procedure accords much deference to management’s exercise of

⁵ See *id.* at 23.

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

A candidate's suitability for a particular position is not always readily apparent by a plain reading of the comments recorded during an interview. Agency decision-makers deserve appropriate deference in making determinations regarding a candidate's knowledge, skills, and abilities. As a result, EDR will not second-guess management's decisions regarding the administration of its procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious. After a review of the interview notes, EDR cannot find anything to indicate that the grievant was so clearly a better candidate that the selection panel's recommendations disregarded the facts or were anything other than a reasonable exercise of discretion based on a good faith assessment of which of the candidates were most suitable for the position. For these reasons, EDR cannot find a sufficient question as to the panelists' interview notes and does not qualify the grievance for a hearing on that basis.

When reviewing the evaluation summaries for the grievant and the three finalists, it appears that the panel ultimately determined that the three finalists better met the knowledge, skills, and abilities necessary for the position. While the grievant suggested that two of the three finalists had less combined experience than him, their respective interview notes included many remarks about their extensive skills and accolades. For instance, both were noted for seizing millions of dollars in drug cases, one candidate was noted to have "excellent level of skills and abilities" and "excellent communication skills and responses," and the other candidate also possessed education and training noted as "extremely relevant." While these remarks are, of course, a small portion of the entirety of the respective finalists' interview notes, much of the remarks follow the similar consensus that they both possess more than the required level of experience, skills, and abilities. It also appears that while one of those two candidates was closer to the grievant's level in terms of skills and experience, the panel appears to have rated the candidate as having provided a better interview performance than the grievant.

While the panelist who did not recommend the grievant did not provide any negative feedback in the interview notes, the panelist's decision was based on the grievant's interview performance especially in comparison to the other candidates. For example, it was noted that the grievant provided short, to-the-point answers and did not provide as impressive an interview as the others. EDR's review of the panel's notes from the grievant's interview and his subsequent evaluation form supports this assessment and shows that the panel's decision to not recommend the grievant was consistent with its assessment of his suitability for the position in reliance on his interview performance. The agency noted in the third-step response that while "[the grievant has] an impressive background in law enforcement . . . , [t]he panelist stated [the grievant] was evaluated on [his] responses to the questions, but [his] answers were unimpressive."

⁶ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis.").

The grievance record does not demonstrate what qualifications the grievant believes he has that exceed those of the selected candidates. The grievant appears to possess a significant level of experience and extensive accolades while working with the Drug Task Force for his agency, such as investigating and concluding several complex, high-profile administrative and criminal cases. While the grievant contends that he has more experience than two of the three finalists combined, DHRM Policy 2.10 is designed to ascertain the candidate best suited for the position, not just to determine who might be qualified to perform the duties of the position.⁷ The agency has provided sufficient evidence showing that they considered the qualifications of the grievant in a holistic manner, but ultimately did not select him for the position because they preferred the skills, abilities, and interview performances of the other selected finalists.

EDR finds nothing in the evaluation forms, nor in the interview notes, to suggest that the agency chose the other candidates over the grievant for any arbitrary or capricious reason. Although the grievant may reasonably disagree with the panel's decision not to recommend him for the Investigator Supervisor position, EDR's review of the grievance record indicates that the selection panel concluded the successful candidates would be more suitable for the position based upon a reasonable assessment of relevant work experience and interview performance. The grievant has not presented evidence to demonstrate that he was not selected for an improper reason or that the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Accordingly, the grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy and does not qualify for a hearing on this basis.

Contention of Pre-selection

Finally, the grievant argues that pre-selection may have been a factor in the agency's ultimate selections, supported by not only the arguments already discussed, but because of certain phone conversations the grievant had with an agency hiring representative and one of the finalists in the selection process. Specifically, he states that he had a conversation with an agency hiring representative who was asking if he knew anyone interested in the position. Apparently, the representative mentioned one of the eventual finalists as a potential candidate, and when the grievant stated that he was also interested in the position, the representative stated that such interest would "make it a tough decision." As to the grievant's conversation with the finalist, the conversation occurred after the initial applications were submitted, and involved them agreeing that they both wanted the position and to work together. Conversely, the agency contends that "[t]here was no preselection made or mentioned to any of the panel members prior to or after the interviews were completed." The agency also contended that the representative spoke with all agents, not just the grievant, regarding interest in the position.

After a thorough review of the record, EDR cannot find evidence to suggest a sufficient question whether the agency engaged in pre-selection pursuant to the selection of the final candidates. Accordingly, the grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy, and does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.⁸

⁷ See *id.* at 23.

⁸ Va. Code § 2.2-1202.1(5).

April 19, 2024
Ruling No. 2024-5667
Page 6

Christopher M. Grab
Director
Office of Employment Dispute Resolution