

Issue: Compensation (other); Hearing Date: 03/27/17; Decision Issued: 07/25/17;
Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 10958; Outcome: Partial
Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION DECISION OF HEARING OFFICER

In re:

Case Number: 10958

Hearing Date: March 27, 2017
Decision Issued: July 25, 2017

PROCEDURAL HISTORY

On July 6, 2016, Grievant filed a grievance to challenge the Agency's calculation of his annual salary. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 14, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 27, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant's salary should be increased because of an error made by the Agency?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. Grievance Procedure Manual

("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Juvenile Justice employs Grievant as an Assistant Superintendent at one of its facilities.

Grievant began working for the Agency on October 1, 1988 as a full time classified employee. His title was Learning Center Supervisor A. Grievant separated from the Agency effective July 24, 1990. He was reinstated by the Agency in September 1990. Instead of identifying Grievant as a reinstated employee and continuing his prior service period, the Agency recorded his status as rehired on July 24, 1990 without including his prior length of service. Thus, the Personnel Management Information System (PMIS) incorrectly showed Grievant's hire date as September 1990. This mistake meant that when the Agency made compensation decisions based on length of service, the amount of compensation Grievant received was understated. Grievant had no responsibility for causing the error.

Grievant received leave based on his correct hire month and year. The Commonwealth's Integrated Payroll and Personnel System (CIPPS) showed "LEAVE ELIGIBILITY DT 10/10/1988."¹

Grievant's Virginia Retirement System New Member Enrollment Form showed his membership date as October 1, 1988.

Grievant received percentage salary increases along with other State employees. His salary increases were calculated by taking his base salary and adding the percentage increase. In other years, Grievant received promotions or salary increases that depended in part on length of service in order to correct salary compression. The Hearing Officer will focus on these latter events.

Effective January 1, 1993, Grievant was promoted to the position of Juvenile Specialist Senior. Effective November 1, 1993, Grievant was promoted to the position of Juvenile Lead Specialist. In May 1997, Grievant assumed the position of Corrections Sergeant. Grievant was promoted to the position of Hearing Officer on September 17, 2001.

On October 15, 2001, Grievant asked the Agency for a pay increase because of a change in his job responsibilities. The Agency granted his request and increased his compensation.

¹ Agency Exhibit 9.

The parties agreed that as of November 24, 2005, Grievant's salary in the amount of \$32,166 was correct.

On November 25, 2005, Grievant received a 3% pay increase with \$50 for every year of his employment. The Agency calculated 15 years, but it should have been 17 years. The 3% was to be calculated after the \$50 per year was added to Grievant's salary according to the Agency. Grievant's Accounting Expert testified the 3% was to be calculated first and then the \$50 per year was to be added to Grievant's base salary.

On November 25, 2006, Grievant received a 4% incentive pay salary increase.

On September 1, 2007, the HR Director sent all Superintendents a memorandum to address workforce recruitment and retention issues within the Agency. The memorandum stated, in part:

Range Adjustment -- Effective November 25, 2007, all Juvenile Correctional Officers and Juvenile Correctional Officers Senior will receive a security increase of \$1,200 and all Security Supervisors (Sergeant through Major) will receive a \$600 increase regardless of the length of service. This will be an increase to the affected employees' based pay.

Geographic Adjustment – Effective November 25, 2007, all security staff employed and assigned at [Facility C] will receive a \$1,200 geographic location increase to their base salary to help offset the high cost of living in that locality. The \$1,200 adjustment, along with the current 4.5% differential, will be removed if the employee leaves their security position at [Facility C]. ***

Long-term Adjustment – Effective November 25, 2007, the agency will provide a security staff employees ... Greater than 15 years = \$500 added to base salary.²

On November 25, 2007, Grievant received a special salary adjustment increasing his salary by \$1,100.

On November 25, 2007, Grievant received a 4% incentive pay salary increase.

On June 25, 2011, Grievant's salary was increased by 5% to account for the requirement that he pay the cost of his retirement funding.

Grievant was asked to transfer to Facility C as a Corrections Captain. Facility C lacked a Chief of Security at that time. Grievant's salary as a Corrections Captain was \$39,704. The Agency changed his position to Security Manager II in pay band 5 with a salary of \$45,660 effective January 24, 2012. Grievant served in an acting capacity.

² Agency Exhibit 5.

On March 27, 2012, Grievant received a letter from the Superintendent Senior advising him:

It is with great pleasure we confirm your promotion within the Department of Juvenile Justice at [Facility C] as a Security Manager II – Corrections Captain ... effective April 10, 2012. *** This will be a promotion within the Commonwealth with an increase in your semi-monthly salary to \$2,447.00 which equates to \$58,729.00 yearly, Pay Band 5, for the Role Title of Security Manager II, which is designated as essential personnel. Please note your annual salary includes a 4.5% special pay of \$2529 and a \$1,200.00 Geographic Adjustment which is assigned to [Facility C]. Should you leave [Facility C] to transfer to another State/DJJ facility that does not have an assigned special pay, you will lose this portion of your annual salary.³

In 2012, Facility C and Facility B1 provided Special Pay to their employees.⁴ Only Facility C had a Geographic Adjustment of \$1,200 per year. Facility B1 did not have a Geographic Adjustment.

The Agency decided to close Facility C. Grievant was sent a Notice of Layoff or Placement⁵ dated February 25, 2014. The Notice showed Grievant's current semi-monthly salary as \$2,561.08 (\$61,465.92 annually). He was informed that he was being placed as a Security Manager II (Captain) at Facility B2 "on or before 06/10/2014." After six months, his salary would be reduced to \$2,400.79 per pay period (\$57,618.96 annually). He was advised he could decline the placement since it was to a position with a lower salary and be placed on leave without pay-layoff for up to 12 months. Grievant did not write on the form that he accepted the placement and did not sign the form.⁶

Grievant did not work at Facility B2 even though he had been notified of his proposed placement at Facility B2.

On April 10, 2014, the Admin Specialist sent an email to Agency employees stating that:

³ Grievant Exhibit 14.

⁴ Grievant testified that the Agency provided a 4.5% Special Pay amount to employees working at Facility C and Facility B1. Facility B2 did not have Special Pay. The Compensation and Employment Manager testified that the 4.5% Special Pay was given to employees because the residents were more difficult to supervise than at other facilities. She testified that both Facility C and Facility B1 provided certain employees with the 4.5% Special Pay.

⁵ A box was checked "Final Notice."

⁶ See, Grievant Exhibit 16.

Effective today, April 10, 2014, [Grievant] will be Acting Assistant Superintendent of Security at [Facility B1].⁷

When Grievant moved from Facility C to Facility B1, his role of Security Manager II in pay band 5 did not change.

On October 2, 2014, Grievant was promoted to Assistant Superintendent for Security at Facility B1. His annual salary was raised to \$70,583 in pay band 5. The Pay Action Request sheet showed Grievant's former "current salary" as \$58,819 plus a differential to equal \$61,466. The document included a statement, "Current salary is \$58,819 with [Facility C] differential pay equals \$61,466."⁸ The increase was shown as a 20% pay increase based on a salary of \$58,819.⁹ An analysis of the decision included a statement that Grievant had worked for the Agency since July 24, 1990 instead of his actual hire date of October 1, 1988.

On August 10, 2015, Grievant's salary was increased to \$73,685.

Grievant received a Notice of Layoff or Placement indicating that he was being placed in the position of Security Manager II / Assistant Superintendent at another facility. On June 15, 2016, Grievant signed the document and indicated that he accepted the placement.

On September 21, 2015, the Recruitment Supervisor sent Grievant an email stating:

I just wanted to give you an update on your state hire date. DHRM has changed it to 10/01/1988 with no break in service. They are working on how to fix your salary for state increases we have received over the years. I will keep you updated as I hear.¹⁰

On March 25, 2017, Grievant's salary was \$73,685.

Grievant filed a Grievance challenging the Agency's mistake. The Third Step Respondent reviewed the appropriate records and considered Grievant's request. The Third Step Respondent concluded:

⁷ Grievant Exhibit 17. Grievant received a temporary pay increase. Temporary pay increases last only as long as the employee is working in an Acting capacity.

⁸ Grievant Exhibit 18.

⁹ In other words, it does not appear that the Agency continued Grievant's 4.5% Special Pay when he moved to Facility B1.

¹⁰ Grievant Exhibit 4.

The findings from the review are as follows:

Agency owes [Grievant] \$1,854.00.
[Grievant] owes agency \$1,915.00.
[Grievant's] salary should be reduced to \$72,717.00 from \$73,620.00.

Due to the fact that errors were made at no fault of [Grievant] the following relief is offered:

[Grievant's] salary remains the same.
[Grievant] does not pay the agency.
The agency pays [Grievant] what is owed from 11/25/05 through 4/10/14 (\$1,274.00), which is prior to October 2014 when the \$1,200 geographical adjustment should have been deducted from [Grievant's] salary.¹¹

CONCLUSIONS OF POLICY

Grievant argued that the Agency understated his current salary because of its error in 1990. Grievant argued that the Agency incorrectly calculated his annual salary and that his salary should be corrected to the amount of \$75,911.24. Grievant has not met his burden of proof to establish this point.

Grievant presented testimony from an Accounting Expert who considered several documents and calculated Grievant's salary beginning in 2005. He calculated "rolling totals" for each year. The Accounting Expert assumed that Grievant went to Facility B2 and that he should receive a Special Pay.¹² The Accounting Expert calculated Grievant's salary by taking his base salary and increasing it by a percentage and then adding the years of service additional payment. Grievant presented two computations of final salary made by the Accounting Expert. It is unclear which computation is in error and why the Accounting Expert changed his opinion. A portion of Exhibit 31 showing a computation by the Accounting Expert does not contain all of the writing on the original page to the left of the page. The Accounting Expert described the policies and procedures he relied on as having ambiguity.

The Agency argued that Grievant's salary was understated initially but in subsequent years, his salary was overstated. When the two inaccurate computations are combined, Grievant's current salary is overstated. The Agency contends Grievant's current salary should be reduced to \$72,717 as of March 25, 2017.

¹¹ Agency Exhibit 1.

¹² The Accounting Expert's statement was not consistent with his later testimony. He testified that he agreed with the Agency's calculation of true base pay of \$57,976 as of October 10, 2014. The Agency's number of \$57,976 already removed the 4.5% special pay amount. Thus, it is unclear whether the Accounting Expert's figure includes or excludes Grievant's 4.5% special pay amount.

The Agency's arguments are not supported by the evidence presented. The Agency's calculation assumes that Grievant was placed at Facility B2 and was working there. By working at Facility B2, Grievant's salary should have been reduced by 4.5% special pay, according to the Agency.

Grievant was issued a Notice of Layoff or Placement showing his reassignment as a Captain at Facility B2 on or before June 10, 2014. He did not sign the form to accept the placement. He did not report to Facility B2 and begin working as a Captain. Instead, he was moved to Facility B1 as Acting Assistant Superintendent of Security. The Agency's calculation should have been made with the assumption that Grievant moved to Facility B1 instead of Facility B2. Because of this error, the Agency's assertion regarding the correct current salary is not supported by the evidence.

The Agency argued that the 4.5% special pay only applied to security staff with ranks of Major and lower. The Agency argued that an Assistant Superintendent at Facility B1 was not a security position. Thus, when Grievant was promoted on October 10, 2014 to a new position, he lost the 4.5% Special Pay. The Agency did not establish this assertion. For example, Grievant was promoted to Assistant Superintendent for Security at B1. As an Assistant Superintendent, he was a Security Manager II. He remained a member of the security staff after his promotion.

The parties have presented their best "guesses" as to what Grievant's salary should have been. Each party's calculation contains assumptions and errors. Neither party's view provides a clear and accurate assessment of Grievant's correct salary. The Hearing Officer will not make a third "guess" as to what Grievant's salary should be based on the evidence presented which is incomplete.¹³

When the Hearing Officer applies State policy to the facts of this case as presented, the Hearing Officer concludes that the most appropriate outcome of this grievance is found as written by the Agency's Third Step Respondent.¹⁴ The Third Step Respondent considered the Agency's and Grievant's calculations and positions and concluded:

[Grievant's] salary remains the same.

[Grievant] does not pay the agency.

¹³ Neither party submitted language from the Appropriations Acts granting salary increases to State employees. Neither party submitted DHRM's Authorization and Compensation memos governing implementation of salary increases. It is impossible to correctly calculate Grievant's salary without these documents. The parties' evidence represents general interpretations of these specifically worded documents. Each party's evidence represents an estimation of Grievant's salary that cannot be verified by the documents submitted as evidence.

¹⁴ The Third Step Respondent did not make this offer contingent on Grievant withdrawing his grievance. Accordingly, it remains a viable resolution of this grievance. The Third Step Respondent considered but did not implement the Agency's lower proposed salary that included an incorrect assumption as discussed above.

The agency pays [Grievant] what is owed from 11/25/05 through 4/10/14 (\$1,274.00), which is prior to October 2014 when the \$1,200 geographical adjustment should have been deducted from [Grievant's] salary.

The Agency must comply with the conclusions of the Third Step Respondent regarding Grievant's salary.

Grievant argued that the Agency incorrectly calculated his leave balances. The amount of leave awarded can vary depending on the number of years an employee has worked for the Commonwealth of Virginia. Grievant has not presented any documents showing his leave was calculated based on an incorrect start date.

The Agency presented a document effective 3/14/2005 showing that as of that date, the Agency showed his start date as October 1, 1988. The Agency did not have a document showing Grievant's leave activity prior to March 14, 2005. The Agency presented a document "run" on March 14, 2005 indicating that Grievant's "Leave Eligibility DT" was October 1, 1988. Thus, it appears that Grievant's leave balances were correctly calculated. Nevertheless, the Hearing Officer's authority to correct any error in Grievant's leave balances would be limited to 30 days prior to the date Grievant filed his grievance.

The Agency's error regarding Grievant's length of service did not affect his enrolment in the Virginia Retirement System. There is no basis to change Grievant's retirement benefit calculation.

DECISION

For the reasons stated herein, the Grievant's request for a higher salary is **denied**. The Agency is **ordered** to implement the Third Step Respondent's conclusions regarding this grievance meaning that Grievant's salary should be \$73,685.00 as of March 24, 2017.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.