

Issue: Misapplied definitions and unfairly applied Compensation Reform procedures; Hearing Date: July 1, 2002; Decision Date: July 2, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5464



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5464

Hearing Date: July 1, 2002  
Decision Issued: July 2, 2002

**PROCEDURAL ISSUES**

**Qualification of hearing**

Grievant initially filed his grievance on October 31, 2000. The agency head completed a third-step response on September 19, 2001 advising grievant that a review of his position would be completed by November 3, 2001. The review was not completed by that date and grievant requested a ruling from the Director of the Department of Employment Dispute Resolution (EDR) as to whether his grievance qualifies for a hearing. The EDR Director ruled that this grievance does qualify for a hearing.<sup>1</sup>

**Testimony of certain witnesses**

Grievant sought to proffer the testimony of investigators who work, or have worked, for other state agencies in roles similar to grievant's role. Grievant's

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<sup>1</sup> No. 2002-028, *Qualification Ruling of Director*, May 31, 2002.

purpose was to illustrate why his position should be reclassified to a higher-level role. The hearing officer declined to hear such testimony for two reasons. First, even if such testimony was persuasive, the hearing officer has no authority to reclassify grievant to a higher-level role.<sup>2</sup> At most, if the hearing officer concludes that the agency failed to comply with policy, he may order the agency to take prompt action to comply with the policy.<sup>3</sup> Second, this decision will address only the issue of policy compliance. It would be inappropriate for the hearing officer to draw any conclusion regarding the merits of grievant's request for a role reclassification. Agency management must make that decision following appropriate study by compensation and human resource specialists, as well as consideration of the overall impact of such a change. The Code of Virginia states, in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."<sup>4</sup> It also states that complaints relating solely to the revision of position classifications shall not proceed to a hearing.<sup>5</sup>

### APPEARANCES

Grievant  
Four witnesses for Grievant  
Representative for Agency

### ISSUES

Did the agency misapply role definitions or unfairly apply adjustment period procedures with respect to grievant's position during the Compensation Reform program of 2000?

### FINDINGS OF FACT

The grievant filed an appeal alleging that the agency misapplied definitions and unfairly applied Compensation Reform procedures when his position was crosswalked from the existing salary grade into the newly created pay band.<sup>6</sup> Grievant acknowledges that the work he performs is described partially by the role definition for Law Enforcement Officer II, and partially described by the Law Enforcement Officer III role definition.<sup>7</sup>

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<sup>2</sup> § 5.9(b)3, *Grievance Procedure Manual*, Effective July 1, 2001.

<sup>3</sup> § 5.9(a)5. *Ibid.*

<sup>4</sup> Exhibit 3. Va. Code § 2.2-3004.B

<sup>5</sup> Exhibit 3. Va. Code § 2.2-3004.C.

<sup>6</sup> Exhibit 1. Grievance Form A, filed October 31, 2000.

<sup>7</sup> Exhibit 5. Memorandum from grievant to agency director, November 5, 2000.

The Department of Corrections (DOC) (hereinafter referred to as agency) has employed the grievant as a Corrections Investigator/Law Enforcement Officer II for 17 years.

The agency employs two types of investigators – institutional investigators and corrections investigators. Prior to 1993, institutional investigators<sup>8</sup> were salary grade 8 and corrections investigators<sup>9</sup> were salary grade 9. In 1993, the salary grade was increased by one level for both types of investigators. In 1999 the salary grade was again increased by one level for both positions; thus, institutional investigators were salary grade 10 and corrections investigators were salary grade 11. On September 25, 2000, the Commonwealth implemented a reform of the classified employee compensation program (hereinafter referred to as Comp Reform). After the Commission on Reform of the Classified Employee Compensation Plan formulated its initial report, a Technical Advisory Committee (TAC) was established to serve as internal consultants to the Commission. The Commission defined certain transition assumptions and directed the TAC to incorporate these into the design of the new plan. Among the assumptions was that no employee would gain or lose money in the transition (cross-walk) to the new plan.<sup>10</sup>

One of the hallmark features of the Compensation Reform program was the creation of nine “pay bands” that replaced the existing 23-salary grade system. Of necessity, multiple salary grades were compressed into one pay band; e.g., salary grades 9, 10 & 11 were compressed into the newly created pay band 4. The salary range for pay band 4 begins at the minimum for the prior grade 9 and has a maximum salary higher than the prior grade 11 maximum.<sup>11</sup> Accordingly, when grievant’s position was crosswalked from grade 11 to pay band 4, his salary (and the salaries of all investigators) remained unchanged.<sup>12</sup>

The Comp Reform program also provided for a similar compression of job descriptions. Prior to Comp Reform, more than 1650 different job classes existed in state government under the existing classification system. One of the goals of Comp Reform was to reduce the number of positions to approximately 275 “roles.”<sup>13</sup> The TAC determined that corrections investigators and institutional investigators would both be converted into the new role title of Law Enforcement Officer II (LEO II), pay band 4.

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<sup>8</sup> Institutional investigators are assigned to one correctional facility and investigate only matters that occur within that facility.

<sup>9</sup> Corrections investigators generally investigate the more serious cases (murder, rape, narcotics trafficking) and perform their work in more than one facility and sometimes conduct investigations that go into the community.

<sup>10</sup> Exhibit 18. *Executive Summary*, Compensation Reform Program.

<sup>11</sup> Exhibit 21. *Compensation Reform Frequently Asked Questions, Second in a Series*.

<sup>12</sup> Exhibit 4. Memorandum to grievant from Human Resource Director, October 12, 2000.

<sup>13</sup> Exhibit 19. Page 12, *Final Report of the Classified Compensation Plan*, January 5, 2000.

The Comp Reform program requires that each state agency formulate and administer a salary administration program. The plan must be submitted to DHRM for review to assure compliance with the general principles of the Comp Reform program. DHRM promulgated to all agencies guidelines for the creation of a salary administration plan. Among other requirements, agency plans must provide for an appeal process utilizing either a) the state grievance process or, b) an agency-specific internal appeals process.<sup>14</sup> DOC's salary administration program does not include an internal appeals process and therefore, by default, relies on the state grievance process.<sup>15</sup>

The second-step respondent (the then Acting Inspector General) advised grievant that she would review grievant's job classification and make recommendations to the agency head. Because the second-step respondent lacks authority to make the change grievant seeks, grievant advanced the grievance to the third step. The third-step respondent (agency head) advised grievant that his existing position had been properly crosswalked to pay band 4. However, the agency director further advised grievant that he had directed that a full review of grievant's position be conducted and that he had been advised [by Human Resources] that the review should be completed within 45 days.<sup>16</sup>

During the late fall of 2001, the Compensation Manager directed a compensation analyst to conduct a review of the corrections investigator position. She completed her review and submitted a draft to the Compensation Manager in March 2002 for his review and comments. She concluded that grievant's position is most accurately described by the LEO III role description and compensable factors. Her draft represents a tentative endorsement to grant grievant's request.<sup>17</sup> It was based, in part, on a similar review conducted in 1999 which resulted in the elevation of grievant's position from salary grade 10 to salary grade 11. That review focused primarily on maintaining a particular relationship to other state investigative classes in agencies such as the State Police, Department of Motor Vehicles and Department of Alcoholic Beverage Control.<sup>18</sup>

Also during the fall of 2001, the second-step respondent conducted her own review of the grievant's role and concluded that corrections investigators should be reclassified as Law Enforcement Officer III, pay band 5.<sup>19</sup>

Since March 2002, when the compensation analyst forwarded her draft recommendation to the Compensation Manager, the matter has languished. The agency Director, during his testimony, stated that he had directed the Human

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<sup>14</sup> Exhibit 2. Appendix A, Section X, *Agency Salary Administration Plan Guidelines*, August 2000.

<sup>15</sup> Exhibit 8. *DOC Salary Administration Plan*.

<sup>16</sup> Exhibit 1. *Step 3 Response* to grievance, September 19, 2001.

<sup>17</sup> Exhibit 14. *Draft Review of Corrections Investigator Assistant Supervisor*.

<sup>18</sup> Exhibit 15. *Review of Corrections Investigator Class*, June 11, 1999.

<sup>19</sup> Exhibit 9. *Review of Reassignment of Role Title of Special Agents*.

Resources Manager to conclude this review and make a final recommendation to the Director not later than July 30, 2002.

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>20</sup>

#### Misapplication of role definition

Grievant contends that the agency misapplied role definitions by assigning his position to the role title of LEO II. He maintains that this assignment was arbitrary because he assumes it was crosswalked solely on the basis of salary grade (His former position was salary grade 11, which automatically crosswalks to pay band 4). While this argument is superficially attractive, grievant has provided no evidence to support his contention that the decision was based solely on an arbitrary numerical decision. In fact, grievant candidly acknowledges that some of the duties he performs are accurately described by the LEO II role title. If, as grievant maintains, his job duties overlap two role titles, the assignment of his position to one of the two titles was necessarily a judgement call.

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<sup>20</sup> § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

It is not surprising that grievant would conclude that his position is described by the higher of the two role titles. On the other hand, the agency's human resource professionals had to make many judgement calls in reassigning positions from the old classification system to the new role titles. It is reasonable to conclude, in the absence of any evidence to the contrary, that the agency attempted to make such decisions in an objective, dispassionate manner based on its understanding of the positions and role titles. Grievant has not shown that the decisions made by the agency were not based on a reasonable and fair evaluation of his position. The mere allegation of arbitrariness is insufficient to support grievant's conclusion.

However, the fact that the agency made such a decision does not necessarily mean that it was the correct decision. During Comp Reform implementation, the agency had to make many such decisions in a limited time. The implementation schedule did not provide sufficient time for a complete and detailed classification review of every position. If the agency made the best decision based on the evidence available at that time, its decision cannot be deemed arbitrary. It is not inconsistent that the compensation analyst's subsequent detailed review of grievant's position reached a different conclusion, and that she now recommends reassignment to LEO III. Therefore, it is concluded that grievant has not borne the burden of proof, to show by a preponderance of the evidence, that the initial decision to convert his position to LEO II was arbitrary.

#### Unfair application of procedures

Grievant contends that DHRM allowed an eight-month period for role adjustments during Phase II of Comp Reform implementation. He specifically refers to a Comp Reform Action Bulletin (CRAB) that states, in pertinent part:

Role corrections must be made as Lateral Role Changes effective November 1, 2001 with no change in employee compensation. The window of time for making local role corrections is November 1, 2001 through December 31, 2001.<sup>21</sup>

A Lateral Role Change is defined as, "This type of Role Change occurs when a position is changed to a different Role in the same Pay Band."<sup>22</sup> The change grievant seeks is not a Lateral Role Change but rather a reassignment to a different role in a different pay band. Thus, the instruction on which grievant relies does not apply to the reassignment of position he seeks. DHRM did not mandate any deadlines for the situation where the change sought is to a different pay band. Thus, agencies are expected to address such requests in the same

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<sup>21</sup> Exhibit 7. CRAB Bulletin No. 29, October 9, 2001.

<sup>22</sup> *Appendix N*, DHRM Human Resource Management Manual, transmitted in CRAB Bulletin No. 15, November 2, 2000.

manner as they had prior to Comp Reform, i.e., the agency should undertake a compensation analysis review, evaluate the impact, and then petition DHRM for approval. Accordingly, grievant has not shown, by a preponderance of the evidence, that the agency has unfairly applied any Comp Reform procedure.

Grievant further complains about the agency's alleged "predisposition to decline the request for consideration." It is correct that the agency declined to make any change in role assignment during Comp Reform implementation. However, given the DHRM guidelines for crosswalking of positions, the agency has acted in compliance with the guidelines. If grievant had requested a change to a different role within the same pay band, and the agency agreed with the request, the agency would have been required to make the change by December 31, 2001. But since grievant has requested a change to a role in a different pay band, the agency may take the time it needs to review the request, conduct any required study, and evaluate the impact of such a change. It is not unusual that it may require several months to complete this process.

There is no evidence that the agency has demonstrated a predisposition to decline the request. To the contrary, it appears that the request has, to this point, received favorable endorsement. The Inspector General has reviewed the request and endorsed it, and the human resources compensation analyst has similarly concluded that the request has merit.<sup>23</sup> The agency Director has now established a short deadline for the Human Resources Department to make its final recommendation to the Director. From its perspective, the agency must weigh several factors, including budget implications, the fact that grievant's position was increased by one salary grade three years ago, and the impact of such a change on other employees and agencies.

### DECISION

The grievant has not demonstrated either that the agency misapplied role definitions or that the agency unfairly applied any procedures. The relief sought by grievant (fair application of procedures and policies) is proceeding, albeit at a pace slower than grievant would prefer. Since the grievance has not been sustained, there is no specific basis upon which to grant relief.

### APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

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<sup>23</sup> However, grievant should understand that favorable recommendations are not a guarantee that change will occur. Recommendations are subject to approval by both agency management and DHRM.



1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.<sup>24</sup>

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

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David J. Latham, Esq.  
Hearing Officer

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<sup>24</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.