

Issue: Misapplication of salary policy; Hearing Date: 02/03/04; Decision Issued:
02/19/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 543



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 543

Hearing Date: February 3, 2004
Decision Issued: February 19, 2004

PROCEDURAL HISTORY

On August 20, 2003, Grievant timely filed a grievance to challenge the Agency's failure to pay him an increase in salary. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The Department of Employment Dispute Resolution ruled that the matter qualified for a hearing in EDR Ruling #2003-177. On January 14, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 17, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether the Agency acted contrary to policy by refusing to pay Grievant a salary increase upon his reemployment with 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 Corrections employs Grievant as an HVAC Installation and Repair Supervisor at one of its facilities. He is well-respected for his strong work ethic and multitude of skills. His trade designations include Master HVAC and Journeyman HVAC.¹

Grievant transferred to the Facility from the University of Virginia on February 10, 1998. On January 9, 2000, Grievant transferred from the Facility to a position with the Department of Correctional Education and received a pay increase. Two weeks later, on January 25, 2000, Grievant requested and was granted a voluntary demotion to transfer back to the Facility with a pay decrease.

In August 2002, Grievant received an employment offer from the University of Virginia with an annual salary increase of approximately \$3,958 above his salary with the Agency. At Grievant’s request, a Determining Rate of Pay Request (DROP) was submitted to the Agency’s Central Office Human Resource division asking for permission for the Facility to make a competitive offer to Grievant and enabling Grievant to remain at the Facility. The Agency’s Central Office Human Resource Manager denied this request. Grievant accepted a position with UVA as a Trades Technician III and transferred there on September 7, 2002 and received the higher salary.²

On January 2, 2003, Grievant submitted an application for employment to fill a vacant HVAC Installation and Repair Supervisor position at the Facility. He was selected for the position. The Facility Human Resource Officer called Grievant and told him he was selected for the position and that the Agency would match the salary he was receiving at UVA. Grievant said he wanted to return to the Agency and would be

¹ Grievant Exhibit 10.

² Grievant Exhibit 5.

willing to work for the same salary he earned at UVA. A start date of July 7, 2003 was set. Grievant asked the HRO if it was possible for him to receive a ten percent salary increase. The HRO said she would check with the Agency's Central Office Human Resource division. She did not act as quickly as she should have. She submitted a DROP to the Central Office Human Resource division on July 3, 2003.

Grievant began working at the Facility on July 7, 2003. The HRO had not sent Grievant a letter confirming his acceptance of employment with the Agency and specifying his compensation. Grievant was supposed to receive a paycheck on July 31, 2003 along with other employees at the Facility. Since Grievant's salary request had not been finalized, the HRO prepared a special check for Grievant. She used the salary listed in the DROP as Grievant's current salary even though the DROP had not yet been approved. Grievant received a paycheck showing a ten percent salary increase. Upon receiving the higher salary, Grievant entered into a contract to purchase a new house and furniture.

On August 14, 2003, the HRO learned that the DROP had been denied.³ Grievant was not to receive the ten percent salary increase that the HRO led Grievant to believe he would receive.⁴ On August 15, 2003, Grievant received a telephone call from the Facility HRO asking him to come to her office. When Grievant arrived at her office, the HRO was upset and crying. She told Grievant that it was all her fault and that she had incorrectly submitted the paperwork to the Agency's Central Office. She said she would call the Central Office staff and ask that Grievant's salary increase be deducted from her pay and given to Grievant.

CONCLUSIONS OF POLICY

DOCPM 5-14 authorizes the Agency to grant a pay increase to a newly hired employee including an employee transferring from another State agency. This policy, however, does not require the granting of a pay increase. Agency managers had sole discretion regarding whether to grant or deny Grievant's request for a pay increase.⁵ The Hearing Officer cannot override that decision.

The Hearing Officer's authority in this case is limited to requiring the Agency to comply with State or Agency policy. Grievant has not identified nor is the Hearing

³ The Agency declined to increase Grievant's pay because the effect would have been for Grievant to receive a 20% salary increase within a one year period.

⁴ The Agency has attempted to recoup the overpayment from Grievant over a several month period.

⁵ EDR Ruling #2003-177 indicates that the Agency incorrectly interpreted DHRM 3.05 regarding whether the Agency could grant a ten percent pay increase. Although the Agency misapplied this policy, no evidence was presented suggesting that the Agency would have exercised its discretion differently had it correctly interpreted DHRM policy.

Officer aware of any policy violated by the Agency and affecting the outcome of this case.

Grievant cannot prevail under contract theory. Grievant accepted the Agency's offer of employment at an amount equaling his UVA salary. An increase in salary was not part of the agreement to return to the Facility.⁶ Grievant indicated he would return to the Facility regardless of whether he received a salary increase. By stating that she would try to get Grievant a salary increase, the HRO's statement confirms that a salary increase was not part of the terms of any agreement prior to Grievant's acceptance of employment. Grievant cannot compel the Agency pay him an increased salary based on the terms of an oral contract with the Agency.⁷

Grievant contends he received a promotion when he transferred from UVA to the Department of Corrections because he changed from a Pay Band 3 to a Pay Band 4. The evidence is unclear regarding whether UVA uses the same pay band system as used by DOC. If the Hearing Officer assumes for the sake of argument that Grievant received a promotion, DHRM Policy 3.05 does not require the Agency to pay him an increased salary.⁸ Any salary increase is negotiable. During the hiring negotiations, the Agency did not agree to grant Grievant a salary increase.

One of Grievant's concerns is that he relied on the HRO's statements and his receipt of an increased paycheck and then purchased a home with the assumption he would be receiving a higher salary. Well established Virginia law is that estoppel does not lie against the Commonwealth.⁹ If the Hearing Officer finds Grievant's reliance reasonable, his reliance does not bind the Agency.

There is little doubt that the HRO made numerous misrepresentations to Grievant. The Hearing Officer's authority, however, is limited in this case to compelling an agency to comply with policy. The HRO's misrepresentations to Grievant did not

⁶ Grievant's oral agreement with the Agency included a salary equal to his UVA salary. Grievant was not promised he would receive a higher salary as part of that agreement. The HRO created an expectation that he might receive a higher salary, but an expectation of a higher salary is nothing more than the possibility of a higher salary, not the certainty of a higher salary.

⁷ EDR Ruling #2003-177 indicates that the Agency failed to comply with DOCPM 5-7.16 stating, "no employing offer or salary should be made orally or in writing until approved by the required persons." The Agency's failure to obtain approval before making an employment offer to Grievant does not alter the outcome of this grievance. The Agency's initial offer to Grievant was without a salary increase. Grievant accepted that offer. If the Agency had waited until it had obtained final approval from the Central Office Human Resource division, the Grievant's salary offer would have been the same as his salary at UVA.

⁸ DHRM Policy 3.05 states, "When an employee is promoted to a position in a different Role in a higher Pay Band, the promotional increase is negotiable between the minimum of the new Pay Band or Alternate Band up to 15% above the current salary."

⁹ "[I]t is well settled that the doctrine of estoppel does not apply to the rights of a State when acting in its sovereign or governmental capacity. This is so because the legislature alone has the authority to dispose of or dispense with such rights." Main v. Dept. of Highways, 206 Va. 143, 149 (1965).

result in the Agency misapplying any policy. Grievant has not met his burden of proof to establish a misapplication of policy.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

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:

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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.¹⁰

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.