

Issue: Misapplication or unfair application of policy regarding residency requirements; Hearing Date: 04/06/05; Decision Issued: 04/07/05; Agency: VSP; AHO: David J. Latham, Esq.; Case No. 8027



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8027

Hearing Date: April 6, 2005
Decision Issued: April 7, 2005

PROCEDURAL ISSUE

In his grievance, grievant alleged that the agency's interpretation of General Order 16 (Assignments and Transfers) violates Department of Human Resource Management (DHRM) Policy 3.05 (Compensation). In a ruling that qualified for hearing the alleged misapplication of policy issue, the Director of the Department of Employment Dispute Resolution (EDR) denied qualification of the compensation pay differential issue.¹

APPEARANCES

Grievant
Attorney for Grievant
Captain
Attorney for Agency

¹ Agency Exhibit 2. *Qualification Ruling of Director Number 2004-932*, March 11, 2005.

Two witnesses for Agency

ISSUE

Did the agency misapply or unfairly apply agency policy? Should grievant be permitted to establish his residence outside the geographical boundaries of the Division to which he has been transferred?

FINDINGS OF FACT

The grievant filed a timely grievance alleging that the agency misapplied or unfairly applied written agency policy relating to residence requirements.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing.³ Grievant requested a ruling from the EDR Director on whether his grievance qualifies for a hearing. The EDR Director issued a ruling qualifying the grievance for hearing.⁴ The Virginia State Police (VSP) (Hereinafter referred to as “agency”) has employed grievant for 30 years; he is a lieutenant assigned to the Bureau of Criminal Investigations (BCI).

In July 2003, grievant requested a transfer to Division VII, which is comprised of the four counties and five cities that constitute the Northern Virginia (NOVA) Pay Area. At the time grievant requested a transfer, the agency’s written policy governing transfers required that BCI employees must reside within 15 miles from their station assignment.⁵ At that time, grievant resided in a community located approximately 75 miles from the Division VII station assignment he was requesting. Grievant understood that if his transfer request was approved, he would have to establish a new residence within Division VII.

In January 2004, the superintendent issued a change that liberalized the residency policy in General Order 16.⁶ However, within two days, the superintendent rescinded those portions of the change that affected Division VII, pending consultation with DHRM.⁷ DHRM policy provides that the pay differential for the NOVA Pay Area is a competitive payment based on the employee’s work site being located within the NOVA Pay Area.⁸ The pay differential is not

² Agency Exhibit 1. Grievance Form A, filed November 10, 2004.

³ Id.

⁴ Agency Exhibit 2. *Qualification Ruling of Director Number 2004-932*, March 11, 2005.

⁵ Grievant Exhibit 7. *General Order No. 16*, revised October 23, 2003.

⁶ Grievant Exhibit 2. *Informational Bulletin – 2004 - No. 4*, January 27, 2004.

⁷ Grievant Exhibit 1. Memorandum from superintendent to Division VII sworn employees, January 29, 2004.

⁸ The VSP’s Division VII has the same geographic boundaries as the NOVA pay Area.

considered a cost-of-living allowance.⁹ Employees of other state agencies who work in the NOVA Pay Area are not required to live within the NOVA Pay Area to receive the pay differential. However, DHRM has approved VSP's requirement that employees assigned to Division VII must reside within its boundaries. The VSP superintendent advised DHRM in February that the VSP pays sworn employees assigned to and residing in Division VII a 24.95% competitive pay differential.¹⁰ On May 1, 2004, after consultation with DHRM in late April, the VSP issued a revised Assignments and Transfers policy.¹¹ The revised policy states, in pertinent part, "All sworn employees assigned to Division VII, excluding Commercial Vehicle Enforcement Officers [CVEO], may live anywhere within the geographical boundaries of Division VII."¹²

In June 2004, grievant learned that it was very likely his transfer request would be granted when the incumbent lieutenant in Division VII retired in October 2004. From July through early October, the incumbent lieutenant was on leave. Grievant was assigned to fill in for the incumbent one or two days per week and traveled to Division VII to fulfill those responsibilities. In October 2004, grievant was notified that his transfer was approved effective October 25, 2004. During the next several days, grievant located a possible new residence that was located outside the geographic boundaries of Division VII but within 50 miles of the field office.¹³ On November 8, 2004, grievant asked his immediate supervisor for approval of the residence.¹⁴ The supervisor advised grievant that he could not approve the residence because it did not comply with policy. In December 2004, grievant established residency within Division VII's geographic boundaries by renting an efficiency apartment.

In December 2004, the agency again revised its transfer policy. The new policy states that sworn employees "**are required to reside** within the geographical boundaries of Division VII, **regardless of area or duty post boundaries.**"¹⁵

The agency does not grant exceptions or waivers to anyone assigned to Division VII; all sworn employees must reside within the division's geographic boundaries. During the past year, agency management received a complaint that four sworn employees assigned to Division VII were living outside the

⁹ Grievant Exhibit 8. Excerpt from Chapter 9, DHRM *Human Resource Management Manual*, July 1, 2003.

¹⁰ Grievant Exhibit 1. Letter from superintendent to DHRM Director, February 4, 2004.

¹¹ Grievant Exhibit 3. *General Order No. 16*, revised May 1, 2004.

¹² Grievant Exhibit 3. Section 12.g, *Id.*

¹³ Grievant Exhibit 3. Section 12.j, *General Order No. 16*, revised May 1, 2004 provides: "Any sworn employee who is permanently assigned to Administrative Headquarters or to a field division office shall reside within a 50-mile radius of the office to which he/she is assigned."

¹⁴ Grievant Exhibit 3. Section 12.c, *Id.*, requires supervisory approval of a new residence before a transferee is allowed to take up residence.

¹⁵ Agency Exhibit 5. Section 12. g, *Informational Bulletin – 2004 – No. 46*, December 22, 2004. Section 12.j. was amended to make clear that it does not apply to Division VII personnel; Division VII personnel are governed by Section 12.g.

geographic boundaries of the Division. The agency investigated these cases and disciplined two employees. One complaint was dismissed and one is pending.

APPLICABLE LAW AND OPINION

The General Assembly enacted the 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, such as claims of misapplication of policy, the employee must present his evidence first and must prove his claim by a preponderance of the evidence¹⁶

The agency's policy, as written effective May 1, 2004, contained an ambiguity in paragraph 12.g. Because the language states that sworn employees *may* live anywhere within the geographical boundaries of Division VII, the word *may* appears ambiguous. It can mean what the agency intended, i.e., that one may live in any of the four counties and five cities that comprise Division VII. However, when considered in conjunction with other language in the General Order, it could suggest, as it did to grievant, that one is not required to live within division boundaries. Grievant relies on paragraph 12.j, which states that any sworn employee assigned to a field office shall reside within a 50-mile radius of the office to which he is assigned.

¹⁶ § 5.8 EDR, *Grievance Procedure Manual*, effective August 30, 2004.

Grievant's position is entirely understandable. In general, the use of the word "may" indicates that an action is permitted, but not required. However, for almost every general rule there are sometimes one or more exceptions. In this case, one must consider the entire context of both the written policy and the circumstances attendant to the revision of the policy. There are five factors that have a bearing on this situation.

First, the genesis of the policy revision was the superintendent's goal of making the policy less restrictive for troopers who had previously been required to reside within 15 miles of an entrance to the interstate/limited access highways they were assigned to patrol. A second goal was to address the issue of differential pay for those living in Division VII. The initial change in January 2004 would have paid differential pay only to sworn employees who lived within the boundaries of Division VII. Employees would have been permitted to live outside the boundaries but they would not receive the 25 percent differential pay. Because this change conflicted with DHRM policy, it was rescinded within two days. However, the aborted change reflects the agency's recognition that Division VII poses a unique problem as compared with the rest of the state, and that differential pay has the potential for creating morale problems.

Second, section 13 of the previous policy (revised October 1, 2003) does not contain a single reference to Division VII. However, section 12 of the new policy (which replaced Section 13 of the old policy) revised May 1, 2004 includes references to Division VII in three subsections (e., f., & g.). It is apparent that the agency intended to, and did, single out Division VII for special treatment in section 12. By the clear language of subsections 12.e. and f., sworn employees of Division VII were excluded from those provisions. Subsection 12.g, which states that Division VII employees may live within the boundaries of Division VII, was created solely to address the unique situation in Division VII. For example, while subsections 12.e. and f. permits a sworn employee in other divisions to reside up to 15 miles outside their division boundary, subsection 12.g. does not permit this for Division VII employees.

Third, the use of the word "may" is intended to allow uniformed troopers in Division VII to live anywhere within the division's boundaries whereas uniformed troopers in other divisions are limited to living within 15 miles from the border of their duty post boundary.

Fourth, the agency's intent in making policy changes cannot be ignored. The agency's stated intent (through testimony) as well as the intent inferred from the aborted January 2004 policy change is clear. The agency wanted to eliminate the morale problem created by having Division VII employees who receive differential pay living virtually next door to employees in other divisions who do not receive such pay. When grievant first applied in 2003 for a transfer into Division VII, he knew that policy required him to establish a residence inside Division boundaries. Grievant knew, or reasonably should have known, that his

interpretation of the May policy revision is contrary to the agency's intent. If grievant is allowed to establish a residence outside Division VII boundaries and receive differential pay, it would circumvent the agency's intent in changing the policy. The agency's intent in this case is further corroborated by the policy revision issued in December 2004, which unambiguously provides that Division VII employees are required to reside within the division's boundaries. Thus, the agency position and intent has been continuously consistent, notwithstanding the unintended ambiguity in the May 2004 revision.

Fifth, subsection 12.j. is in conflict with subsection 12.g. because it does not include the words "excluding Division VII personnel" as subsections 12.e and f. do. Had subsection 12.j. included those four words, there would be little doubt that the 50-mile radius language is not applicable in grievant's situation because one must look to subsection 12.g for guidance on Division VII employees.

Taking the above factors into account, it must be concluded that the agency's intent was that Division VII sworn employees (excluding CVEOs) *must* live within the geographical boundaries of Division VII. While the agency's policy is capable of being interpreted in more than one way, the hearing officer must give the agency's interpretation substantial deference. There is no evidence to suggest that the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy. Therefore, the policy as interpreted by the agency is enforceable. The fact that grievant was able to come up with a different interpretation does not negate the agency's interpretation. At the point when grievant's supervisor advised him that the agency interpretation is that he must reside in Division VII, grievant had not detrimentally relied on his own interpretation. He had not yet purchased a new residence and therefore grievant had fair notice of the agency's interpretation.

Grievant, if he had so chosen, could have declined to accept the transfer if he felt strongly enough about the location of his residence. However, the fact is that grievant had determined from July 2003 that he wanted to transfer into Division VII for the sole purpose of increasing his average salary during the three years prior to retirement. It was only after issuance of the policy change in May 2004 that grievant saw a possible method to have his cake and eat it too – by accepting a transfer and getting a 25 percent pay differential, while maintaining a residence outside Division VII boundaries.

Grievant also argues that the VSP residency requirement for Division 7 effectively puts the agency's pay differential policy at odds with the policies of other state agencies that do not have residency requirements. The agency points out that it is significantly different from other state agencies in two major respects. First, it is a paramilitary organization and the morale of its employees is very important. Second, it is the only agency that provides state-owned vehicles to all of its sworn employees and allows them to use the vehicles for commuting. Thus, an agency employee's residence becomes more visible

because the state-owned VSP vehicle is parked at the residence on a daily basis. If the agency permitted Division 7 sworn employees to reside outside the Division, employees from other divisions who do not receive a pay differential but live in the same community would have a morale problem.

Grievant argues that the May 2004 policy revision should be considered a “grandfather clause” and that he should be permitted to establish a residence outside the boundaries of Division 7. This argument is not persuasive. If grievant’s interpretation of the policy was the only correct interpretation, a grandfather argument might have more merit because the policy would create an exemption based on circumstances previously existing. In this case, however, the circumstances grievant asserts in his argument never existed. At no time did the agency explicitly and unambiguously permit, or intend to permit, Division VII sworn employees to reside outside division boundaries.

DECISION

Grievant has not shown, by a preponderance of evidence, that the agency unfairly applied or misapplied agency policy. Grievant’s request for relief is hereby DENIED.

APPEAL RIGHTS

You may file an administrative review request within **15 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 15 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 15-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.¹⁷ 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.¹⁸

[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]

David J. Latham, Esq.
Hearing Officer

¹⁷ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.