

Issue: Misapplication of payroll policy; Hearing Date: 05/19/11; Decision Issued: 07/29/11; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 9551; Outcome: No Relief (except reduction in payback amount; **Administrative Review: EDR Ruling Request on issue of payback amount received 08/08/11; EDR Ruling No. 2012-3056 issued 12/15/11; Outcome: Remanded to AHO; Remand Decision issued 12/16/11; Outcome: Changed original ruling – no reduction in payback amount; Administrative Review: DHRM Ruling Request received 08/11/11; DHRM letter issued 12/22/11; Issue is now moot - no reason to review; Judicial Appeal – Appealed to Loudoun County Circuit Court; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9551

Hearing Date: May 19, 2011
Decision Issued: July 29, 2011

PROCEDURAL HISTORY

The Virginia State Police overpaid Grievant and has attempted to collect the overpayment. On February 8, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 2, 2010, the Department of Employment Dispute Resolution denied qualification of the grievance for hearing. On February 8, 2011, the local Circuit Court ordered:

- (1) The instant appeal is GRANTED and the Qualification Ruling is REVERSED;
- (2) Appellant's grievance is qualified for hearing pursuant to Virginia Code section 2.2-3004(F) and the Appellee should take the necessary steps to initiate the process; and
- (3) This matter is DISMISSED WITH PREJUDICE and is hereby stricken from the Court's docket.

On April 4, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On May 19, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Counsel
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether the Agency misapplied or unfairly applied State policy?

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:

In 2004, the Virginia Department of State Police began a process of increasing the compensation for its sworn law enforcement officers. How a law enforcement officer’s salary changed depended on several factors such as the employee’s rank and years of service with the Agency. The Agency referred to this change in salary as a “crosswalk”. Once changes were made to an employee’s salary in 2004, future percent increases in salary were based on that revision.

The Agency employs sworn law enforcement officers working in a Role Title referred to as a Law Enforcement Officer III. A Law Enforcement Officer III is compensated within Pay Band 5 as established by the Department of Human Resource Management (DHRM). The Agency has established at least two Sub-Bands within the DHRM Pay Band 5. Employees serving as Senior Troopers within the Role Title of Law Enforcement Officer III are compensated under Sub-Band 12. Employees serving as Special Agents within the Role Title of Law Enforcement Officer III are compensated under Sub-Band 13. The range of salary available under Sub-Band 13 is higher than the range of salary available under Sub-Band 12.¹

¹ DHRM Policy 3.05, Compensation, defines Salary Range as: “The pay range assigned to a position for purposes of recruitment, Pay Practices, and compensation administration. A salary range may be the

The Agency sometimes uses the term "Trooper Agent" to refer to an employee with a special assignment. A Trooper Agent is not a separate rank or position but rather is a working title.

Grievant began working for the Virginia Department of State Police in 1989. In 2004, he was working in the Northern Virginia region as a Senior Trooper. Grievant's compensation in the form of salary consisted of a base salary plus a 24.95 percent increase because he worked in Northern Virginia.

The Agency provides additional compensation to employees assigned to task forces such as the Executive Protection Unit, Aviation Unit, or other task forces. Employees assigned to a task force often receive a ten percent Special Rate. Grievant began receiving a Special Rate equaling an additional ten percent of his salary in October 2003 when he was assigned to a task force. That Special Rate ended before September 25, 2005 when he stopped working on a special assignment.

In 2003, Grievant was working for the Agency's Bureau of Field Operations. Effective October 1, 2003, Grievant was assigned to the United States Marshall's Service Fugitive Task Force and moved to the Agency's Bureau of Criminal Investigation/General Investigation Division for coordination and supervision. The duration of his assignment was "intended to be indefinite". Many Agency employees began referring to Grievant as a Trooper Agent following his new assignment.

The Agency documented Grievant's change in assignment using a Personnel Action Form. The Personnel Action Form was signed by the Human Resource Director and dated December 16, 2003. The Form described the action taken as a Transfer. Grievant's Current Status described his Role Title as "Law Enforcement Officer III (Senior Trooper)", Role Code as "69073", Position Number as "30075", and Pay Band as "5". Grievant's New Status listed his Role Title, Role Code, Position Number, and Pay Band as "same". Grievant's Salary did not change except that his Total compensation increase by a Special Rate equaling 10% of his Salary.

On June 4, 2004, the Human Resource Director approved a Personnel Action Form showing Grievant would be Transferred effective June 10, 2004. Grievant's Current Status listed his Organizational Unit as "BCI-GIS-Fugitive Task Force", Role Title as "Law Enf. Off. III (Senior Trooper)", Role Coded as "69073" and Position Number as "30075". Grievant's New Status listed his Organizational Unit as "Fug. Task Force [location]". Grievant's New Status listed his Role Title, Role Code, and Position Number as "same".

For several years, the Agency's pay structure for sworn employees had been studied by various committees who made numerous recommendations regarding the

Pay Band; an Alternate Band; a Sub-Band; a Northern Virginia (FP) Expanded Range; or, for competitive recruitment actions, a hiring range, as determined by the agency."

need to improve employee compensation. On July 12, 2004, the Agency Head sent all sworn employees Information Bulletin-2004-31 to provide details concerning the Agency's retention plan and pay adjustments. In addition to increasing the pay for new Troopers, the pay plan was intended to correct various pay inequities that had occurred over a number of years. Information Bulletin-2004-31 provided:

The implementation of the inequity component of the pay plan is the most complex. The objective of the inequity component is to equalize pay within each rank based on the years of sworn service with the Department. Currently, there are a number of sworn employees in any given rank that had more years of service than other sworn employees in the same rank but their pay is, in some cases, substantially lower. The inequities were created over a number of years and have been a continuing source of concern.

Each sworn employee will receive a notification letter from the Personnel Division which will document your exact years of sworn service with the Department. The attached chart titled "Pay Inequity Cross Walk" will indicate your salary effective September 25, 2004. It is important to note that the 2002 plan placed sworn employees in multi-year groupings for crosswalk placement purposes up to 30 years. These groupings were from 2-5 years and established an approximately \$1400 difference between each group. The revised crosswalk provides separate groupings for each year of service up to 30 years, with a \$712 difference in salary between groupings. This approach is more consistent with the intent of the plan that those with more seniority be compensated at a higher level than those with less service time. You will need to refer to your rank and years of State Police sworn service to determine if you are eligible for an inequity adjustment.

Effective with the implementation of the new pay plan on September 25, 2004, sworn employees who are promoted will no longer receive a standard 10% pay increase. Competitive and non-competitive promotions will receive specific increases, yet to be determined, or advanced to the minimum of the new pay band. Special temporary pay adjustments such as those for Aviation and EPU will receive specific step increases, yet to be determined, because sworn employees for these assignments are selected through a competitive process.²

The Pay Inequity Cross Walk table attached to Informational Bulletin-2004-31 showed a Pay Amount of \$52,392 for employees with 15 years of service and holding the Rank of Special Agent Acct., Senior Special Agent, Surveillance Agent, and Sergeant. It showed a Pay Amount of \$48,117 for employees with 15 years of service

² Grievant Exhibit 2.

and holding the Rank of Master Trooper and Special Agent. It showed a Pay Amount of \$45,267 for employees with 15 years of service and holding the Rank of Senior Trooper.

Because Grievant was a Senior Trooper with 15 years of service, his Pay Amount should have been \$45,267. The Agency mistakenly considered Grievant to be a Special Agent with 15 years of service and set his Pay Amount at \$48,117. After determining the Pay Amount, the Agency increased Grievant's salary to account for his work location and Special Rate. Grievant was not involved in the Agency's decision-making process and was not aware of the Agency's mistake.

On September 8, 2004, the Human Resource Director sent Grievant a letter addressed to him as a State Police Special Agent. The letter stated, in part:

You were notified in Information Bulletin–2004-31 (available in the Public Folders), that the Department was legislatively appropriated funding for the sworn pay plan. Phase I was the \$630 base pay adjustment effective July 10, 2004. Phase II is a pay inequity adjustment based upon the years of sworn service in this department for each rank which will be effective September 25, 2004. Effective November 25, 2004, Phase III will include an annual base pay adjustment of \$1816. Employees working in the Northern Virginia pay area will also have the NOVA differential calculated on these amounts.

For Phase II, a pay inequity crosswalk was developed for each rank and years of sworn service with the Department. This crosswalk was included with IB 2004 – 31. You verified your years of sworn service with the Department in a letter dated August 4, 2004. Your years of Department sworn service were rounded up to the next whole year. Employees whose salaries were below that salary for their years of sworn service will receive an adjustment up to that amount as determined by their years of service on September 25, 2004.

Based on your calculated years of sworn Department service and current rank, your annual base salary effective September 25, 2004 which includes adjustments for special assignment rates (i.e. Aviation, EPU) will be \$66,135. Effective November 25, 2004, with the \$1816, your salary will increase to \$68,404. The NOVA differential was included in the salary for employees working in the Northern Virginia pay area.³

Grievant believed that the Agency correctly calculated his salary following the cross walk because he relied on the September 8, 2004 letter from the Human Resource Director specifying his compensation.

³ Agency Exhibit 2.

On August 9, 2005, Captain J sent the Agency Head a memorandum with the subject line "Trooper Agent Position # 30075, U.S. Marshall's Office". The memo stated:

In October of 2003, at the direction of the Superintendent, [Grievant] was assigned to the US Marshall's task force in [location]. At the time of his transfer, he was assigned to [Bureau of Field Operations, location]. His position was later upgraded to a trooper agent position. His position in BFO was moved to the new position.

[Captain C] and I have discussed this assignment and feel that this should be a two-year assignment. [Grievant's] two years will expire in October. It is therefore requested that this position be advertised for [location, Bureau of Field Operations (only)] and proper interviews conducted to fill the vacancy. [Grievant's] position should be returned to [Area] effective September 25, 2005 and the replacement trooper's position should then be upgraded to the current trooper agent position.⁴

On September 12, 2005, Major C sent Grievant a memorandum stating:

Effective September 25, 2005, you are relieved of your present duties and assignment, and transferred to [Division, location]. This transaction will be carried on the next Special Order in the usual manner.⁵

On September 21, 2005, the Human Resource Director, approved a Personnel Action Form showing that Grievant's position was Transferred effective September 25, 2005. The form showed Grievant's Organizational Unit changing to the new location. Grievant's Current Status listed his Role Title as "Law Enforcement Officer III (Troopers/Agent)", Role Code as "69073", Position Number as "30075" and Pay Band as "5". Grievant's New Status listed his Role Title as "Law Enforcement Officer III (Senior Trooper)". Grievant's Role Code, Position Number, and Pay Band were listed as "same". Grievant's Current Status showed a Salary plus a Special Rate equaling 10% of his Salary. The New Status showed Grievant's salary without a Special Rate. Grievant's Total salary was reduced by 10% effective September 25, 2005.

On November 25, 2005, Grievant received a three percent merit increase. On November 25, 2006, Grievant received a four percent merit increase. On November 25, 2007, Grievant received a four percent merit increase.

The Director of the Personnel Division requested that the Internal Audit Section of the Virginia State Police conduct a special audit of the actions related to personnel transfers into and out of Northern Virginia for the period beginning January 1, 2004 and

⁴ Grievant Exhibit 1.

⁵ Grievant Exhibit 1.

ending December 31, 2008. The objective of the audit was to verify that the Personnel Division correctly applied or removed the pay differential for all individuals transferred into and out of the defined Northern Virginia area during these years. The audit was based solely on the review of salary data and related pay change transactions as recorded in the Personnel Management Information System (PMIS). The Agency Head was informed of the audit findings in October 2009.

The Internal Audit's review revealed 16 salary adjustment errors, with only some of those involving transfers into or out of the Northern Virginia differential areas. The auditors concluded:

Our review revealed that the following two sworn employees received inflated 2004 Pay Inequity Plan adjustments due to being evaluated as Special Agents instead of Sr. Troopers when applying the minimum salary per the "Crosswalk" schedule. The salary overpayment errors in 2004 have led to other cumulative overpayments in subsequent years, and they also lead to errors and applicable special pay computations.⁶

Name	Effective Date of Additional Erroneous Pay Action	Estimated Total Grows Over (Under) Payment
[Grievant]	09/25/2004	\$26,000
[another employee's name]	09/25/2004	\$4,900

The Internal Auditors calculated the salary that Grievant should have received and compared it to the salary Grievant actually received to determine an overpayment of \$25,986 as of October 10, 2009. Their findings were as follows:

Date	Correct Salary	Salary per PMIS	Difference	Description
7/10/2004	\$51,592	\$51,592		Last known correct salary amount.
9/25/2004	\$56,561	\$61,323	(\$4,762)	Pay Inequity crosswalk (15 years for Sr. Trooper

⁶ Grievant Exhibit 5.

Date	Correct Salary	Salary PMIS	per	Difference	Description
11/25/2004	\$58,424	\$63,186		(\$4,762)	Retention Salary Increase of \$1491
11/25/2005	\$61,206	\$66,111		(\$4,905)	\$50 for every service year (16) and performance increase of 3%
11/25/2006	\$63,654	\$68,755		(\$5,101)	Performance increase 4%
11/25/2007	\$66,200	\$71,505		(\$5,305)	Performance increase 4%
Date	Correct Special Pay	PMIS Special Pay		Difference	Description
7/10/2004	\$5,149	\$5,149			Last known correct salary amount.
9/25/2004	\$5,656	\$4,812		\$844	
11/25/2004	\$5,842	\$6,319		(\$477)	
9/25/2005					Removed Special Pay (no longer in task force).

The Internal Auditors concluded:

On average, every one with the Special Agent position received approximately 10 to 11 percent increase, while [Grievant] received 19 percent. This newly discovered additional type of salary error involved an error in the application of sworn rank, which is further detailed in the following detailed work papers. Further analysis into the Personnel Division's retained 2004 Pay Inequity documentation and consultation with Personnel Division we discovered a second individual [name] who also received a higher than average pay increase. Both individuals were members of special task forces and classified as Trooper Agents. At the time of the task force assignments both individuals held the same rank of Senior Trooper, but were classified as Special Agents for purposes of the pay inequity adjustment. Further inquiry with Personnel Division and Sworn Programs personnel determined that this classification was incorrect since both individuals are compensated for the special duty to a

temporary special rate adjustment of 10 percent of gross salary while assigned to the task force.⁷

On January 28, 2010, the Agency Head sent Grievant a memorandum stating:

The Internal Audit Unit of the Department's Office of Performance Management and Internal Controls (OPMIC) recently completed an audit of the employee salary transaction histories in the Personnel Division. During this audit some errors/miscalculations were discovered concerning the salary transaction histories of some employees when compared to the Agency's Salary Administration Plan. You were one of the employees whose salary transaction history contained errors.

As the result of this audit, it has been determined that you are being compensated at a higher level than permitted under the policies of the Salary Administration Plan. It was further determined that you have received this overpayment since September 25, 2004. Your salary is being adjusted to the correct amount of \$66,200 and will be reflected in your February 1, 2010 pay. The Payroll Service Bureau is currently calculating the amount of salary overpayment received by you during this period so that reimbursement can be made by you to the Commonwealth. After receiving this data, the Personnel Division will schedule a meeting with you to discuss the details of this audit and the options available to you for repayment.⁸

In May 2010, the Department of Accounts, Payroll Service Bureau, calculated the overpayment to Grievant as follows:⁹

Period	Regular Pay: As Paid	Regular Pay: Correct Pay	Difference	Overtime Pay: As Paid	Over time Pay: Corrected Pay	Differenc e	Total Pay Difference
9/25/04 – 12/24/04	\$16,814.60	\$15,725.02	(\$1089.58)	\$272.64	\$261.31	(\$11.33)	(\$1191.91)
CY 05	\$68,168.98	\$63,037.33	(\$5,131.65)	\$1361.16	\$1263.93	(\$97.23)	(\$5,228.88)
CY 06	\$66,331.44	\$61,410	(\$4921.44)	\$951.07	\$882.74	(\$68.33)	(\$4989.77)
CY 07	\$68,984.14	\$63,866.16	(\$5,117.98)	\$2826.10	\$2616.45	(\$209.65)	(\$5,327.63)
CY 08	\$71,505.12	\$66,199.92	(\$5,305.20)	\$2320.40	\$2148.23	(\$172.17)	(\$5,477.37)
CY09	\$71,505.12	\$66,199.92	(\$5,305.20)	\$2758.68	\$2554.01	(\$204.67)	(\$5,509.87)
12/25/09 – 1/24/10	\$5,737.71	\$5,516.66	(\$221.05)	\$257.82	\$238.69	(\$19.13)	(\$240.18)
Total	\$369,047.11	\$341,955.01	(\$27,092.10)	\$10,747.87	\$9,965.36	(\$782.57)	(\$27,874.61)

⁷ Grievant Exhibit 6.

⁸ Agency Exhibit 1.

⁹ Grievant Exhibit 5.

The Agency seeks to recover the overpayment of \$27,874.61. It has denied Grievant's request to make repayment in the form of reducing Grievant's leave balances. The Agency's position is that the overpayment should be collected from Grievant's paychecks.

CONCLUSIONS OF POLICY

Grievant seeks to prevent the Agency from reducing his salary in February 2010 and collecting and overpayment of salary that began in September 2004 and ended in January 2010. Grievant's request for relief must be denied. The Agency has the authority to correct Grievant's salary to eliminate the excessive compensation and to collect the excessive compensation erroneously paid to Grievant beginning in September 2004. The Agency did not misapply or unfairly apply State policy.

Grievant contends that the Agency correctly classified him as holding the rank of Special Agent on September 25, 2004 and, thus, no overpayment was made. This argument fails. The Agency established the rank of Senior Trooper and the rank of Special Agent. It did not create a rank of Trooper Agent. Although Grievant may have been "transferred" in the sense of performing different duties in a new location, he was not transferred to a new or vacant position.¹⁰ The Agency's Personnel Action Forms show that his Role Title, Role Code, and Position Number remained the same before and after he became a Trooper Agent.¹¹ Although Grievant's working title may have changed to Trooper Agent, his position remained a Senior Trooper and he did not become a Special Agent.

When the Agency mistakenly treated Grievant as a Special Agent with 15 years of service, it assigned Grievant a higher Pay Amount than it should have. This resulted in an overpayment beginning in 2004. The Agency continued its overpayment until January 2010 when it re-calculated Grievant's salary using the Pay Amount for a Senior Trooper that it should have used in 2004. Grievant received an overpayment over a several year period.

Grievant argues that the Agency lacked the authority to reduce his salary effective February 1, 2010. Although there is no specific policy that authorizes¹² an

¹⁰ Different positions within an agency have different position numbers. An employee is transferred under DHRM policy only if that employee begins working in a different position with a different position number. Agency managers sometimes referred to Grievant's new duties as a transfer or to his new location as a transfer, but his position number did not change. Although Grievant's duties and location may have changed over time, he was not transferred as the term is used in DHRM policy.

¹¹ The Agency does not have a separate and distinct rank or position of "Trooper Agent." Under DHRM policy, Grievant was not promoted when he became a Trooper Agent and he was not demoted when he became a Trooper Agent. The term "Trooper Agent" is best described as a working title.

¹² There is no specific authority in policy that would prevent the Agency from recalculating Grievant's salary to correct an error.

agency to reduce an employee's salary to correct an error it made in calculating that salary, agencies have broad authority under DHRM Policy 3.05, Compensation, to adjust employee compensation to reflect specific salary issues and fairness. For example, DHRM Policy 3.05 authorizes agencies to make In-Band Adjustments which are defined as:

This multi-faceted Pay Practice allows agency management the flexibility to adjust employees' salaries on the basis of Change in Duties, Professional/Skill Development, Retention, and Internal Alignment.

In-Band Adjustments provide employees potential salary growth by recognizing career progression, and provide management with tools to resolve **specific salary issues**. (Emphasis added).

An Internal Salary Alignment is:

This is one of thirteen Pay Factors used for pay determination purposes. Internal Salary Alignment is a fairness criterion that takes into consideration the proximity of one employee's salary to the salaries of others who have comparable levels of training and experience; duties and responsibilities; performance; and knowledge, skills, abilities and competencies.

In-Band Adjustments are made to increase employee compensation and, thus, would not be applicable to Grievant's circumstances. Given that the Agency has the authority to increase employee salary to reflect fairness and specific salary issues, it has the discretion to reduce an employee's salary to reflect fairness and specific salary issues such as preventing an overpayment from continuing.

Grievant argues that the Agency lacks the authority to collect an overpayment from him. The Agency has the authority to collect the overpayment from Grievant under Department of Accounts policy. The Commonwealth Accounting Policies and Procedures Manual, Topic No. 50510 governs *Unpaid Leaves of Absences and Overpayments*.¹³ This policy provides:

Overpayments may result from unreported periods of LWOP and late, slow, or incorrect paperwork (e.g., timesheets, leave slips). Agencies must take appropriate steps to collect overpayments. Agency policies and procedures governing the collection of overpayments should be established and communicated in writing for employees. The procedures for recovery of overpayments differ depending upon whether the employee is active or terminated.

¹³ The Agency presented TOPIC 50510 as it was written in 2009. It is unnecessary for the Agency to produce earlier versions of that policy. The Agency's decision to collect was made in 2010 and TOPIC 50510 authorizes that decision.

[Active] Employees should be notified of the overpayment and given repayment options within the guidelines established by the agency. Repayment options may include full payment by personal check or a mutually agreeable payroll docking schedule. The docking schedule may call for partial payments over multiple pay periods, but in no cases should the repayment occur over a longer period of time than the overpayment occurred. For example:

- Employee overpaid for one period, the employee's pay should be reduced by the amount of the overpayment in one pay period.
- Employee overpaid for four pay periods, the employee's pay should be reduced over four pay periods to recover the overpayment.

If the agency is reimbursed by personal check, the employee's masterfile information must be updated to reflect the repayment. See CAPP Topic No. 50705, *Employee and Tax Masterfile Updates*, for more information. Special procedures are required if the overpayment and collection occur in different calendar years (this is discussed in more detail later in this topic).

Repayment of prior year wages. If repayments are received for wages paid during a prior year, notify DOA and request a W-2c for the employee. DOA will generate a 941c to recover the Social Security and Medicare taxes. Federal and state taxable wages and withholding may not be adjusted because the wages were paid during a prior year.* DOA will file Forms W-2c and W-3c with the SSA to correct social security and Medicare wages and taxes. Once the agency receives the W-2c, the original should be given to the employee and a copy retained by the agency.

*Note: The wages paid in error in the prior year remain taxable to the employee for that year. This is because the employee received and had use of those funds during that year. The employee is not entitled to file an amended return (Form 1040X) to recover the income tax on these wages. Instead, the employee is entitled to a deduction (or credit in some cases) for the repaid wages on his or her income tax return for the year of repayment. Employees should be advised to contact their tax professionals for advice.

Topic No. 50510 mandates that the Agency attempt to collect the overpayment from Grievant. The Agency may reduce or "dock" Grievant's pay checks so that it receives partial payments from Grievant over multiple pay periods not to exceed the number of pay periods during which the overpayment accrued.

Grievant argues that Va. Code § 2.2-804 does not authorize the Agency to collect the overpayment from Grievant. The Agency has sufficient authority to collect the overpayment from Grievant under Topic No. 50510. Although it is not necessary for the Agency to show that Grievant had legal liability under Va. Code § 2.2-804 for the overpayment, the Hearing Officer will address the application of the statute.

Virginia Code § 2.2-804 provides:

If any officer or employee of the Commonwealth, whether or not exempt from the provisions of Chapter 29 (§ [2.2-2900](#) et seq.) of this title, contrary to any applicable statute, regulation or written policy of the Commonwealth, obtains or authorizes any other officer or employee to obtain any compensation or other payment to which an employee is not entitled, and upon the written request of his employer, fails or refuses to return or reimburse such compensation or payment, then both the employee who received the payment to which he was not entitled and the employee who authorized the payment shall be liable for repayment to the employer. Liability shall not attach unless such authorization was given with actual or constructive knowledge that the recipient employee was not entitled to such compensation or payment.

As long as he remains an officer or employee of the Commonwealth, and liability is admitted, his employer may recover the compensation or payment from any compensation or other payments to which the officer or employee is entitled as an administrative offset pursuant to § [2.2-4806](#). However, the offset shall not exceed the amount allowed pursuant to § [8.01-512.3](#). If the officer or employee leaves state service, liability is disputed or recovery cannot be accomplished, the employer may request the Attorney General to bring an action for restitution pursuant to this section, and the court may award the prevailing party costs and reasonable attorneys' fees.

The provisions of this section shall not apply to good faith disbursements made to beneficiaries of the Virginia Retirement System.

Grievant is an employee of the Commonwealth who obtained, contrary to Agency policy, compensation to which he was not entitled. The Agency made a written request for reimbursement but Grievant refuses to reimburse the Agency. Thus, Grievant shall be liable for repayment to the employer.

Grievant argues that he did not “obtain” compensation under the statute because he did not seek the overpayment; it was given to him because of the Agency’s mistake. The Hearing Officer interprets the term “obtain” to include receiving compensation regardless of whether Grievant actively attempted to receive the overpayment.

One could argue that “[l]iability shall not attach” to Grievant because there was no actual or constructive knowledge that Grievant was not entitled to the additional compensation. Va. Code § 2.2-804 addresses an “employee ... [who] obtains” and an “employee ... [who] **authorizes** any other officer or employee to obtain”. (Emphasis added). The statute provides that liability shall not attach to “such authorization”. The Hearing Officer construes the exculpatory provision of the statute to apply only to an employee who “authorizes any other officer or employee to obtain” and not to an “employee ... [who] obtains.” Grievant is an employee who obtained an overpayment. He is not an employee who authorized another employee to obtain an overpayment.

Hearing Officer Recommendation

The Hearing Officer has the authority to make recommendations regarding the outcome of a grievance hearing. Section 5.7 of the *Grievance Procedure Manual* describes the Hearing Officer’s authority to include:

- Render written decisions on qualified grievances and provide appropriate relief; and
- Take other actions as necessary or specified in the grievance procedure.

The *Rules for Conducting Grievance Hearings* provides:

In addition to the actions listed in §5.7 of the *Grievance Procedure Manual*, the hearing officer is responsible for the following:

- Writing a decision that contains a statement of the issues qualified, findings of fact on material issues and the grounds in the record for those findings, conclusions of policy and law, any aggravating or mitigating factors that were pertinent to the decision, clearly defined order(s) and any recommendations when appropriate.

Hearing officers should be aware that as of 2000, a party may petition the circuit court for an order implementing a hearing officer’s order or *recommendation*. Therefore, hearing officers should be cognizant that, as a practical matter, their recommendations may have the same force and effect as their orders. If a recommendation is made, the hearing decision should clearly identify it as such and distinguish it from an order. Absent a court order, an agency is not compelled to act upon any recommendation. All remedies provided by a hearing officer in his decision, whether ordered or recommended, must conform to law and policy.

Virginia Code § 2.2-3006(D) provides:

Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision or recommendation of a hearing officer.

There are several reasons why it is appropriate for the Hearing Officer to recommend that the Agency seek reimbursement from Grievant for an amount less than the total amount of the overpayment. First, it is clear the Grievant took no action or engaged in any behavior that could be construed as inappropriate, contrary to policy, contrary to regulation, or contrary to State law. Grievant is a victim of errors made by Agency employees possessing skills and abilities that should have enabled them to avoid making errors regarding Grievant's compensation. Grievant did not know nor should he have known that Agency employees made errors that resulted in an overpayment to him.

Second, Grievant did not receive a windfall from the overpayment. The Agency contends Grievant received a windfall because he was over compensated for several years. Grievant adjusted his lifestyle based on an assumption of a certain level of compensation. Had Grievant's compensation been properly calculated, he would have been able to adjust his financial lifestyle accordingly.

Third, the Agency's error was not only to incorrectly classify Grievant in 2004, it failed to timely identify its error. In 2004, the Agency calculated Grievant's salary using a Pay Amount of \$48,117 instead of using a Pay Amount of \$45,267 or a difference of \$2,850. If the Agency had timely identified its error, the hardship on Grievant of repaying \$2,850 would have been significantly less than the hardship of having to repay approximately \$27,000.

Fourth, Grievant has had to obtain legal counsel to properly evaluate the Agency's claim against him. Although parties are responsible for their own legal expenses under the Grievance Procedure, Grievant would not have needed to obtain legal counsel if Agency employees had performed their duties properly.¹⁴ His decision to have his claim evaluated by an attorney is understandable and appropriate. Grievant did not anticipate that the Hearing Officer would wish to consider his legal expenses as part of a recommendation and, thus, the amount of Grievant's legal expense is not known to the Hearing Officer.

Fifth, the Agency intends to recover money from Grievant in the form of having one dollar returned for every dollar overpaid. Grievant has already incurred and likely paid federal and State income taxes on the overpayment he received in the form of income. Although the Agency intends to reverse the transaction and recover its money, TOPIC 50510 recognizes that the IRS does not treat an overpayment in such a straightforward manner. TOPIC 50510 states that Grievant will not be able to file an amended tax return to reduce his prior income and recover the additional income taxes

¹⁴ Employees who are reinstated after being removed from employment, however, may be entitled to an award of attorney's fees.

he paid on his inflated salary. Grievant will have to take a deduction on his income tax returns going forward. TOPIC 50510 states:

The wages paid in error in the prior year remain taxable to the employee for that year. This is because the employee received and had use of those funds during that year.

The IRS considers that the employee received and had use of the funds, but the Agency makes no such distinction. When it recovers all of its money, the Agency will be made whole. Grievant may or may not be made whole by taking a deduction when he files future tax returns. The Agency's error has created at least two additional tax problems for Grievant. The issue is so complex that it would be reasonable for Grievant to employ the services of a tax professional to determine how to comply with federal tax law to solve an unusual tax problem. In addition, Grievant may or may not be made whole if he deducts the overpayments on his future federal tax returns as outlined in TOPIC 50510.

Upon consideration of these five factors, the Hearing Officer recommends that the Agency reduce the amount of the overpayment to \$9,000 and collect that amount in monthly payments over a 64 month period.

The Hearing Officer recommends that the Agency permit Grievant to apply the dollar value of his annual and compensatory leave to the amount claimed by the Agency. Annual and compensatory leave are a form of compensation to an employee.

DECISION

For the reasons stated herein, Grievant's request for relief is **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. 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
600 East Main St. STE 301
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 all of your appeals to the other party and to the EDR Director. 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. 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.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9551-R

Reconsideration Decision Issued: December 16, 2011

RECONSIDERATION DECISION

On December 15, 2011, the EDR Director issued Ruling 2012-3056 remanding the grievance to the Hearing Officer for further consideration. The EDR Director wrote:

Accordingly, the hearing officer's recommended relief is not in compliance with the grievance procedure. Upon remand, the hearing officer is ordered to revise the hearing decision consistent with this ruling.

The EDR Director's Ruling has the effect of reversing the Hearing Officer's recommendation. Accordingly, the Original Hearing Decision is amended to delete any Recommendation.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the

circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer

December 22, 2011

[Parties to the Grievance]

RE: **Grievance of [Grievant] v. Virginia State Police**
Case No. 9551

Please be advised that based on decision rendered by the hearing officer in the Reconsideration Decision dated December 16, 2011, this Department will not respond further to the agency's request for an administrative review.

Sincerely,

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services

c: Sara R. Wilson, Director, and DHRM
Claudia T. Farr, Director, EDR
Carl W. Schmidt, Hearing Officer
Captain Joseph W. Walters, VSP