

Issue: Qualification – Compensation (Other); Ruling Date: January 14, 2013; Ruling No. 2013-3499; Agency: James Madison University; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of James Madison University
Ruling Number 2013-3499
January 14, 2013

The grievant has requested a ruling on whether her November 26, 2012 grievance with James Madison University (the University) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management finds that this grievance does not qualify for a hearing.

FACTS

In her November 26, 2012 grievance, the grievant has challenged the fact that she was deemed ineligible for receipt of the state employee bonus in November 2012. The grievant was ineligible because she had received a Written Notice during the applicable performance period on December 14, 2011. However, the grievant asserts that when she received that Written Notice, she was told by human resources staff at the University that it would not affect her bonus. Additionally, she argues that she was encouraged not to file a draft grievance dated December 13, 2011. After proceeding through the management steps, the University determined that the grievance does not qualify for a hearing. The grievant now appeals to EDR.¹

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary or capricious.⁴

¹ Additional facts pertinent to EDR's analysis of the issues are included in the Discussion section below.

² See *Grievance Procedure Manual* § 4.1 (a) and (b).

³ See Va. Code § 2.2-3004(B).

⁴ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

The grievant's direct challenge to being denied a bonus does not appear to fall into any of the types of cases that can qualify for hearing under the grievance procedure.⁵ Indeed, this case is best described as a challenge to the content of a law and/or policy. There is no indication that the University somehow misapplied the bonus guidelines and inappropriately determined the grievant was ineligible. Based on the applicable budgetary language, an employee who received a Written Notice during the performance cycle, as the grievant did, was not eligible for the November 2012 bonus. While a grievant is entitled to pursue such a grievance through the management steps, it is not the type of case that can be qualified for a grievance hearing.⁶ Therefore, the only way in which this grievance could qualify for a hearing to challenge the bonus issue, is if the grievant could somehow timely challenge the source of her ineligibility: the December 14, 2011 Written Notice.

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.⁷ When an employee initiates a grievance beyond the 30 calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed. Therefore, a grievance initiated in November 2012 would clearly be untimely to challenge the December 14, 2011 Written Notice absent extraordinary circumstances of just cause.

The grievant asserts that she was told that her receipt of the Written Notice would not affect her eligibility for the bonus and that she was encouraged not to file a draft grievance. If these allegations were true, it is possible to argue that the agency improperly induced the grievant not to file a grievance. Based on that set of facts, in the interests of equity, an employee could be permitted to file a grievance late, for instance, if the facts relied upon by the employee were later discovered to be misrepresented. However, based on EDR's review of the facts, we are not persuaded by the grievant's arguments.

First, the grievant has presented a draft grievance, dated December 13, 2011, she states she had taken to the University's human resources office to file. She states that following meetings with various members of the human resources staff she was encouraged not to file the grievance and everything would work out "ok." The grievant is very firm in her recollection of these conversations. While we find it unlikely that the University's human resources staff would actually encourage an employee not to file a grievance, in the end, this issue is irrelevant. The draft grievance makes no reference to the December 14, 2011 Written Notice. Consequently, even if the agency had encouraged the grievant not to file the draft December 13, 2011 grievance, it would not have challenged the Written Notice that is necessary to put the question of the grievant's ineligibility for the bonus in issue.

EDR has also investigated the facts relating to the grievant's assertion that she was told the Written Notice would not affect her bonus. The grievant is adamant that such a representation was made. We take the grievant at her word. However, based on our

⁵ See *Grievance Procedure Manual* § 4.1 (a) and (b).

⁶ See Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

⁷ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2.

reconstruction of the facts, it is not likely that this statement, if indeed it was made to the grievant, was about the November 2012 state employee bonus. It is believed that the conversation at issue took place in early January 2012. At that time, the General Assembly had yet to approve the state budget or the Governor's proposed bonus. Consequently, no one would have known the rules associated with eligibility for the state employee bonus at that time. We find it exceedingly unlikely that the member of the University's human resources staff would have provided such a definitive answer to the grievant's question when the answers were not yet available.

However, the University already had plans for a University-wide bonus for all employees in May 2012 unrelated to issues of performance. Therefore, we find it more likely than not that if the grievant posed the question of whether her "bonus" would be affected by the Written Notice in January 2012, the member of the University's human resources staff would have responded in reference to the University bonus, not the state employee bonus that had yet to be finalized. The alleged response by the member of the University's human resources staff, therefore, would be correct as it relates to the University bonus, which was not affected by receipt of a Written Notice. Based on EDR's review of the facts, we find it more likely than not that this was the miscommunication that may have occurred. While the grievant may have been asking about the state employee bonus, the response she received was information about the University bonus. Such a truthful miscommunication does not appear to be misrepresentation, fraud, or some kind of improper inducement.

While unfortunate, we cannot find a sufficient basis here to allow the grievant to file a grievance to challenge the Written Notice at this late date. Therefore, because there is no mechanism by which the grievant may timely challenge the source of her ineligibility for the bonus, there is no basis to qualify the grievance for a hearing to challenge her denial of the bonus. EDR's qualification and compliance rulings are final and nonappealable.⁸



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⁸ Va. Code § 2.2-1202.1(5).