

Issues: Qualification – Benefits (retirement) and Compensation (other); Ruling Date: February 12, 2014; Ruling No. 2014-3786; Agency: Department of Corrections; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of Department of Corrections
Ruling Number 2014-3786
February 12, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his September 17, 2013 grievance with Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In 1999, the General Assembly passed legislation establishing the Virginia Law Officers’ Retirement System (“VaLORS”), which is administered by the Virginia Retirement System.¹ Correctional officers, as that term is defined in Virginia Code Section 53.1-1, are among the categories of employees eligible to receive VaLORS benefits upon retirement.² A “correctional officer” is defined by statute as “a duly sworn employee of the Department of Corrections whose normal duties relate to maintaining immediate control, supervision and custody of prisoners confined in any state correctional facility.”³

The grievant is employed by the agency as a Unit Manager. When he was promoted to Unit Manger, the grievant became ineligible for membership in VaLORS because the agency does not classify Unit Manager as a “correctional officer” position. In addition, the agency has implemented a salary differential of 4.56% for Corrections Officers, Corrections Officers Senior, Corrections Sergeants, Corrections Lieutenants, Corrections Captains, and Corrections Majors at several facilities, including the one at which the grievant works. The grievant is not currently eligible for the salary differential, however, because Unit Manager is not on the list of approved positions.

On or about September 3, 2013, the grievant discovered that a recent security post audit at his facility had been revised to include Unit Managers who work there. The grievant filed a grievance on or about September 17, 2013, alleging that the revised post audit demonstrates that Unit Manager is now considered to be a “correctional officer” position and thus should qualify for VaLORS and the salary differential. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

¹ See Va. Code § 51.1-211 *et seq.*

² *Id.* § 51.1-212.

³ *Id.* § 53.1-1.

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.⁴ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁵ Thus, claims relating to issues such as to the establishment or revision of wages, salaries, position classifications, or general benefits 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 or agency policy may have been misapplied or unfairly applied.⁶ The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁷ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁸ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁹ Here, the grievant has alleged an adverse employment action because he claims that the revised post audit made him eligible for several employment benefits that he does not currently receive.

VaLORS Eligibility

The grievant argues that the agency classified Unit Managers at his facility as "correctional officers" when it revised the security post audit to include those positions, with the result that he should be eligible for VaLORS. In support of this claim, he asserts that he is a sworn agency employee and that he spends his time at work "directly supervising offenders and security staff" consistent with the statutory definition of a correctional officer. The agency claims that only security positions that are within the agency's rank structure (i.e., Corrections Officer, Corrections Officer Senior, Corrections Sergeant, Corrections Lieutenant, Corrections Captain, and Corrections Major) are eligible for VaLORS. Because Unit Manager is not a

⁴ See *Grievance Procedure Manual* § 4.1.

⁵ See Va. Code § 2.2-3004(B).

⁶ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁷ See *Grievance Procedure Manual* § 4.1(b).

⁸ *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁹ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

position within the rank structure, the agency argues that it is not a security position that confers VaLORS benefits.

Though we are sympathetic to the grievant's situation, it appears that his claims are best described as a challenge to the content, interpretation, and/or application of the VaLORS statutes rather than an allegation that the agency has misapplied and/or unfairly applied state or agency policy. EDR has been unable to identify any mandatory policy provision that the agency may have violated, and the grievant has cited to none. Likewise, the grievant has presented no evidence that the agency's actions are inconsistent with other decisions regarding VaLORS eligibility of other Unit Managers or are otherwise arbitrary or capricious.

We do not disagree that there may be fair argument as to whether the grievant may be employed as a "correctional officer," and thus potentially eligible for VaLORS. Grievances relating solely to the "[e]stablishment or revision of . . . general benefits,"¹⁰ however, do not qualify for a hearing. Whether the grievant is being improperly denied VaLORS benefits is solely a question of application and interpretation of law and, thus, may not proceed to a grievance hearing per statute¹¹ as a benefits issue or under some other qualifiable theory.¹² Such matters are more properly determined by a legal proceeding in a court of appropriate jurisdiction. As a result, we must conclude that the grievant's claim regarding his possible eligibility for VaLORS does not qualify for a hearing. We further note that this ruling only determines that this issue does not qualify for a hearing under the grievance statutes. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to this claim.

Salary Differential

The agency has implemented a Security Level Differential of 4.56% for security personnel at certain facilities, including the one at which the grievant works, "to attract applicants to work with high risk offenders." DHRM Policy 3.05, *Compensation*, states that agencies may approve salary competitive differentials "as base pay adjustments to make salaries more competitive with the market." Agency Operating Procedure 120.1, *Compensation*, further states that differentials "may be applied to a particular position, work title, Standard Occupational Classification (SOC) or Role because the normal pay range is not competitive due to market conditions in a specific agency or geographic location."¹³ The Security Level Differential at issue in this case only applies to employees at the grievant's facility with the following position titles: Corrections Officer, Corrections Officer Senior, Corrections Sergeant, Corrections Lieutenant, Corrections Captain, and Corrections Major.

The grievant argues that the revised security post audit indicates that his position qualifies for the Security Level Differential because he works directly with offenders like the security personnel who currently receive the differential. Agencies, however, have the authority

¹⁰ *Grievance Procedure Manual* § 4.1(c).

¹¹ See Va. Code § 2.2-3004(C).

¹² See *Grievance Procedure Manual* §§ 4.1(b), (c).

¹³ Department of Corrections Operating Procedure 120.1, *Compensation*, § III.

to put competitive salary differentials in place for particular positions, subject to approval from DHRM.¹⁴ The grievant is not eligible for the 4.56% Security Level Differential because Unit Manager is not a position for which it has been approved. The agency's revision of the post audit at his facility did not modify the eligibility requirements for the Security Level Differential. While the grievant may disagree with the agency's choice of which employees are eligible for the Security Level Differential, management has significant discretion in the administration of its policies and standard facility operating procedures.¹⁵ EDR cannot second-guess management's decisions regarding the administration of such procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.¹⁶ The grievant has not presented evidence that the agency's determination that he is ineligible for the Security Level Differential is either inconsistent with other decisions or is otherwise arbitrary or capricious. For example, EDR has reviewed nothing to suggest that any employees other than those with the approved position titles are eligible for the Security Level Differential. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹⁷



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¹⁴ See DHRM Human Resource Management Manual, ch. 5 at 6, ch. 9.

¹⁵ See, e.g., EDR Ruling No. 2011-2903.

¹⁶ See, e.g., EDR Ruling No. 2009-2090.

¹⁷ See Va. Code § 2.2-1202.1(5).