

Issues: Compliance – Grievance Procedure (5-Day Rule), and Qualification – Benefits (Retirement); Ruling Date: April 2, 2015; Ruling No. 2015-4109; Agency: Department of Corrections; Outcome: Grievant in Compliance, Not Qualified.



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

**COMPLIANCE AND QUALIFICATION RULING**

In the matter of the Department of Corrections  
Ruling Number 2015-4109  
April 2, 2015

The Department of Corrections (the “agency”) and the grievant have both requested rulings from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the grievant’s November 21, 2014 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding his grievance. The grievant asks that the November 21, 2014 grievance be qualified for hearing by EDR.

FACTS

On or about November 21, 2014, the grievant initiated a grievance with the agency. This grievance challenged the agency’s failure to provide the grievant with an enhanced retirement package upon the closing of one of its facilities. Though the grievant was first notified that his position was subject to elimination as part of the facility closing and, thus, he would be eligible for enhanced retirement benefits, he was subsequently informed that due to a mistake in the agency code applicable to certain employees, his position would no longer be eliminated. Because the grievant was not subject to layoff, he was determined not to be eligible for enhanced retirement benefits when he elected to resign.

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. On December 29, 2014, the agency head denied the grievant’s request. The grievant appears to have received the agency head’s denial on January 6, 2015, but he apparently did not take any action regarding the grievance until March 2, 2015, when he returned the grievance materials to the agency and asked to appeal the agency head’s qualification decision to EDR.

DISCUSSION

The agency has asked EDR to close the November 21, 2014 grievance for noncompliance with the grievance procedure, as the grievant failed to take any action regarding the agency head’s qualification decision from January 6, 2015 until March 2, 2015. The grievant has asked EDR to qualify the grievance for hearing. Each of these requests will be addressed below.

### *Compliance*

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>2</sup> If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.<sup>3</sup>

In this case, the agency does not appear to have notified the grievant of his noncompliance prior to the grievant taking action to appeal the agency head's qualification. Further, even in the event such notice had been given, the grievant has now come into compliance with the grievance procedure. As a result, the agency's claims regarding noncompliance may be regarded as moot. Additionally, the delay, whatever and whoever the cause, does not appear to have created any material prejudice in this case warranting closure of the grievance without examining the merits of the qualification request. Accordingly, EDR will not close the grievant's November 21, 2014 grievance for noncompliance. EDR's rulings on matters of compliance are final and nonappealable.<sup>4</sup>

### *Qualification*

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>5</sup> Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to a hearing"<sup>6</sup> unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

<sup>2</sup> *See id.*

<sup>3</sup> While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

<sup>4</sup> *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

<sup>5</sup> *See id.* § 2.2-3004(B).

<sup>6</sup> *Id.* § 2.2-3004(C).

At issue in this grievance is the agency's failure to provide enhanced retirement benefits to the grievant. As a result of budget cuts in 2014, the agency decided to close the main campus of the P facility. When the agency conveyed this information to employees of P facility on October 15, 2014, the agency apparently advised employees that those with the X agency code would be eligible for enhanced retirement benefits. The grievant was assigned to this agency code and therefore understood he would be eligible.

At the time the agency made this announcement, the agency's Central Office apparently believed that the X agency code applied only to those employees who worked at the main campus of the facility, which would be closing. After beginning the layoff process, however, Central Office Human Resources staff became aware that a number of employees who did not work at the main campus had been miscoded with the X agency code. The agency corrected the erroneous codes and advised affected employees that their positions were not part of the layoff on October 21, 2014. When the grievant subsequently attempted to retire with enhanced retirement benefits, he was advised that he was not being laid off and was therefore ineligible for the enhanced benefits. The grievant has now retired from the agency and asserts that the agency's failure to provide him with enhanced retirement benefits is retaliatory and a misapplication or unfair application of policy.

### Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;<sup>7</sup> (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.<sup>8</sup> Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.<sup>9</sup>

Here, the grievant engaged in protected activity by using the grievance procedure.<sup>10</sup> Assuming without deciding that the denial of enhanced retirement benefits constitutes an adverse employment action, there is no evidence in this case to suggest that the agency's stated reason for its action is pretextual or that the grievant's protected activity is a but-for cause of the adverse action. To the contrary, the evidence indicates that the grievant was only one of 43 employees

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<sup>7</sup> See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

<sup>8</sup> See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

<sup>9</sup> See *id.* (citing *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013)).

<sup>10</sup> See Va. Code § 2.2-3004(A).

who were incorrectly coded as working at the main campus. Further, it appears similar coding problems have been found to exist during layoffs at two other agency facilities, and all have been handled by the agency in a consistent manner. Accordingly, we conclude that the grievant's claims do not raise a sufficient question as to whether retaliation has occurred, and they do not qualify for a hearing on this basis.

Misapplication or Unfair Application of 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."<sup>11</sup> 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."<sup>12</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>13</sup> For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his retirement benefits.

Though we are sympathetic to the grievant's situation, EDR is unable to find that policy has been violated by the agency in this case. EDR has found no mandatory policy provision that would prohibit the agency's actions in this case, and the grievant has also presented no evidence that the agency's action was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. Rather, it appears that the change in the grievant's agency code was a result of attempting to bring the coding into alignment with those employees who had actually been determined to be subject to the layoff, and that its actions were consistent with those taken in similar situations. Therefore, we conclude that the evidence does not raise a sufficient question that any policies have been either misapplied and/or unfairly applied to qualify for hearing.

EDR's qualification rulings are final and nonappealable.<sup>14</sup>



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<sup>11</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>12</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>13</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

<sup>14</sup> Va. Code § 2.2-1202.1(5).