

Issue: Qualification/Position/Classification/Transfer and Compensation; Ruling Date: May 5, 2003; Ruling #2003-047; Agency: Virginia State Police; Outcome: Not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Virginia State Police/ No. 2003-047
May 5, 2003

The grievant has requested a ruling on whether his March 22, 2002 grievance with the Virginia State Police (VSP or the agency) qualifies for a hearing. The grievant claims that the agency misapplied or unfairly applied state and agency compensation policies after his request for transfer from the position of State Police Sergeant to Special Agent, which resulted in his being paid less than similarly situated employees. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is currently a Special Agent with VSP. Previously, he was a State Police Sergeant (Grade 14), but on January 7, 2000, he requested a transfer to the position of Special Agent (Grade 13). His request was made in accordance with VSP policy, which provides that Sergeants may be considered for transfer to Special Agent or senior Special Agent.¹ On May 26, 2000, VSP granted his transfer request, with an effective date of June 25, 2000. As a result of the transfer and the one-step decrease in his grade, VSP reduced his salary by four pay steps (9%), from \$63,083 to \$57,706.

The grievant knew VSP could reduce his salary to that which a similarly situated Special Agent would be paid, and he was willing to accept the reduction in salary in order to assume the position of Special Agent.

In early 2002, however, the grievant learned that his salary as a Special Agent was substantially less than that of another Special Agent who had been his classmate at the State Police Academy. The grievant obtained from VSP's Personnel Division the salaries of members of his State Police Academy class who, like himself, were still stationed in the northern Virginia differential area. Based upon the information provided, the grievant concluded that the disparity in salaries resulted from how he had attained the rank of Special Agent -- two promotions and a transfer (Trooper II to Senior Trooper to Sergeant to Special Agent), whereas his classmate had attained the rank of Special Agent through two promotions (Trooper II to Senior Trooper to Special Agent).

On March 22, 2002, the grievant initiated a grievance alleging that policy had been misapplied or unfairly applied, resulting in his pay being less than similarly situated employees.

¹ See State Police Manual, General Order No. 16, "Assignments and Transfers."

Subsequently, the agency head advised the grievant that his grievance was not timely filed and was being administratively closed. The grievant requested a compliance ruling from this Department, and on January 2, 2003, we ruled that the grievance was in compliance with the grievance procedure because the grievant had initiated his grievance within 30-calendar days of receiving an allegedly disparate paycheck.²

While the grievant's compliance ruling was pending before this Department, other Special Agents, who also had moved by request to the position of Special Agent from the position of Sergeant, initiated grievances challenging their respective salaries. The grievant notes that these two Special Agents were granted relief during the management resolution steps. On February 12, 2003, the agency head denied qualification of his grievance, and he requested a qualification determination from this Department.³

DISCUSSION

Complaints relating solely to the transfer and assignment of employees within an agency and to the revision of wages, salaries, and position classifications "shall not proceed to hearing"⁴ unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy. For the grievant's claim of misapplication 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.

The grievant challenges the agency's classification of his move from Sergeant to Special Agent as a *demotion* (which resulted in a four-step decrease in his salary), asserting that it was a *transfer*. As evidence, the grievant states that his move to Special Agent was based upon his submission of a *transfer* request. In this request, he cites his compliance with VSP's General Order No. 16, which permits a Sergeant to be considered for *transfer* to Special Agent provided that the employee meets the requisite criteria.⁵ Additionally, he states VSP's categorizations of his move to Special Agent have been inconsistent, maintaining that "[t]he same action cannot be labeled a transfer for the purposes of one policy and a demotion for the purpose of another,"

² See EDR Ruling No. 2002-103.

³ In his letter to this Department requesting qualification of his grievance, the grievant reached an erroneous conclusion, which merits comment. The grievant states that EDR's compliance ruling (Ruling No. 2002-103) "implicitly endorsed qualification" of his grievance because "[i]t would be entirely illogical to render such a ruling if the underlying matter cannot be qualified for a hearing" and, in fact, "the compliance ruling would be rendered moot." This conclusion, however, ignores the grievance procedure rules and fails to recognize the significance of the management resolution step process as a method of resolving conflict. By statute and pursuant to the grievance procedure, *all* complaints initiated in compliance with the grievance process may proceed through the three resolution steps, thereby allowing employees to bring their concerns to management's attention, but *only certain issues qualify for hearing*. See Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* § 4, pages 10-11. As explicitly stated in the last sentence of the ruling, this Department's decision only recognized the grievance was timely filed and could proceed through the management resolution steps, and the ruling in no way reflected upon the substantive merits of the grievant's claim.

⁴ Va. Code § 2.2-3004(C).

⁵ See State Police Manual, General Order No. 16, "Assignments and Transfers," page 16-1.

noting that the agency has alternated between the terms transfer, demotion, reassignment, and demotion/transfer in various agency documents.⁶

The controlling state policy in this case is the Department of Human Resource Management (DHRM) Policy No. 3.05, Compensation. Significantly, the grievant's move from the position of Sergeant to Special Agent became effective on June 25, 2000, prior to the effective date of the Commonwealth's new compensation policy.⁷ Therefore, the applicable policy in this instance is the old compensation plan, consisting of 23 pay grades and 21 fixed steps within each pay grade.⁸ Under this policy, a demotion is "reassignment to a position in a lower salary grade," and a transfer is "reassignment to a position in the same salary grade."⁹ In this case, the grievant requested a transfer to the position of Special Agent, a position designated one pay grade lower than that of Sergeant. Therefore, at the time of the grievant's move, it would have been appropriately classified as a voluntary demotion.¹⁰ Based upon VSP's Voluntary and Performance Demotion policy, when an employee takes a voluntary demotion, the salary will be decreased at the same rate as a promotional increase.¹¹ According to DHRM policy, a one pay grade increase grants four additional pay steps; thus, the salary decrease here would be four pay steps.¹²

Notwithstanding inconsistencies in the agency's labeling of the move, VSP did not misapply compensation policy when it reduced the grievant's salary. The grievant's move from the position of Sergeant to Special Agent was clearly a demotion based upon both state and agency policy in effect at that time. Additionally, the grievant has presented no evidence that he was unaware that his requested *transfer* would result in his move to a lower pay grade or that management sought in any way to intentionally mislead him regarding this fact. Indeed, the grievant acknowledges that he knew his salary might be reduced to that which a similarly situated Special Agent would be paid. Furthermore, prior to the effective date of his reassignment to Special Agent, VSP gave him his Personnel Action Form, which designated the move as a *demotion* and showed the decrease in his pay. At that time, the grievant did not dispute the reduction in salary because he "had the reasonable expectation of receiving approximately the same salary as any other Special Agent of like seniority."¹³ Thus, the grievant's primary claim does not appear to be his reduction in pay, (which did not violate a mandatory policy provision) but that his salary is not comparable to that of other similarly situated employees, which is essentially an unfair application of policy claim. Such a claim does not qualify for a

⁶ See Letter to Director of EDR requesting qualification, dated February 19, 2003.

⁷ The Commonwealth's new compensation reform plan became effective on September 25, 2000.

⁸ See DHRM Policy No. 3.05, effective September 16, 1993.

⁹ DHRM Policy No. 3.05, Definitions, II (C) and (I), effective September 16, 1993.

¹⁰ After Compensation Reform in 2000, positions in Grades 12-14 became Pay Band 5. The new DHRM Policy No. 3.05 defines a voluntary demotion as an employee initiated movement to a different position in a *lower* Pay Band. Therefore, under current policy, the grievant's move from Sergeant to Special Agent would not be a demotion, but rather a transfer (moving to a position in the *same* pay band). See DHRM Policy No. 3.05, Definitions, effective September 25, 2000, revised March 1, 2001.

¹¹ See Informational Bulletin – 1992 – No. 10, dated March 4, 1992.

¹² DHRM Policy No. 3.05(III)(F)(2), effective September 16, 1993.

¹³ Letter to Director of EDR from Grievant, dated March 4, 2003. The letter was mistakenly dated March 2, 2002, rather than 2003.

hearing unless there is sufficient evidence that the decision was arbitrary or capricious or plainly inconsistent with other similar decisions within the agency.

An “arbitrary or capricious” decision is made without regard to the facts, by pure will or whim, and is one no reasonable person could make after considering all available evidence.¹⁴ If the decision is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the decision itself or with the reasons given is insufficient to qualify an unfair application of policy claim for a hearing when there is adequate documentation and/or information in the record to support the conclusion that the decision had a reasoned basis.¹⁵ However, if the grievance raises a sufficient question as to whether the determination is plainly inconsistent with other similar situations, or resulted merely from personal animosity or some other improper motive, such as discrimination or retaliation, rather than a reasoned basis, a further exploration of the facts by a hearing officer may be warranted.

As evidence of his claim of unfair application of policy, the grievant first notes that another employee currently in the position of Special Agent has a higher salary, although he has a very similar background. The disparity in their salaries resulted from the manner in which they attained the position. Each started in the position of Trooper II, but the other employee received two promotions on his path to Special Agent, whereas the grievant had two promotions and a demotion (with the demotion subsequently reducing his pay by four pay steps). Thus, the grievant alleges that VSP’s voluntary demotion policy, which according to the policy “ensures equity for all employees and provides consistent compensation management practices,”¹⁶ actually created an inequity in this instance and, as applied by the agency to his circumstances, was so unfair as to amount to a disregard of the intent of the applicable policy.¹⁷

Here, however, the agency had limited options under the policy in effect when the grievant requested the reassignment. DHRM policy expressly prohibited an agency from providing a salary increase upon demotion, and VSP’s own policy required a decrease in salary.¹⁸ Furthermore, the portion of the policy cited above by the grievant reads in totality “[t]his policy ensures equity for all employees and provides the agency with consistent compensation management practices for voluntary and performance demotions.”¹⁹ Thus, the intent of this policy was to ensure equity and consistency only among those employees who were *demoted*, not among all employees who were either demoted or promoted. Here, the grievant has not presented evidence that the agency applied the policy without regard to the facts or without a reasoned basis, or that others to whom this policy applied were treated differently when they were *demoted*. As stated by the third-step respondent, “the policy that was in place and that

¹⁴ See *Grievance Procedure Manual* § 9, page 23.

¹⁵ See *Norman v. Department of Game and Inland Fisheries* (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.) (defining “arbitrary and capricious” as applied to case of an allegedly arbitrary and capricious performance evaluation).

¹⁶ See Informational Bulletin – 1992 – No. 10, dated March 2, 1992.

¹⁷ Letter to Director of EDR requesting qualification, dated February 19, 2003.

¹⁸ DHRM Policy No. 3.05(III)(G)(2), effective September 16, 1993; see also Information Bulletin – 1992 – No. 10, dated March 4, 1992.

¹⁹ See Informational Bulletin-1992- No. 10, dated march 2, 1992 (emphasis added).

[management was] required to follow was followed fairly and impartially in [the grievant's] case."²⁰

As further evidence in support of his unfair application of policy claim, the grievant notes that VSP has provided relief to two employees who filed "virtually identical" grievances, while failing to grant his requested relief.²¹ Like the grievant, both of the employees had moved from the position of Sergeant to Special Agent and had their respective salaries reduced by four pay steps. In contrast to the grievant, however, one of the cited employee's reduction in pay included not only the 9% required under the demotion policy, but also the loss of the northern Virginia differential. Thus, his salary was reduced by almost 33%. Because of the severity of the decrease in this employee's salary, the agency head increased his salary by 3.5% in order to lessen the impact of such a substantial decrease in pay.²²

In addition, unlike the grievant, the other employee's move to Special Agent became effective July 25, 2001, after the implementation of the Commonwealth's new compensation policy. Due to a revision of the agency's Salary Administration Plan, VSP decided to adjust his salary to the step he would have achieved under the old pay system if he had been directly promoted to Special Agent.²³ VSP made this adjustment for all similarly situated employees under the Plan that became effective December 2000. The grievant was not granted an adjustment because his demotion had become effective on June 25, 2000, prior to the implementation of the new plan. Further, management maintains that it cannot grant the grievant's request without establishing precedent for "for an unknown number of other people who have asked for demotions and were granted them under the same policy that was applied to [the grievant] at even an earlier date."²⁴ VSP states that to alter the grievant's salary now could create a misapplication or unfair application of policy for those who preceeded the grievant in requesting and receiving demotions, and could also open the floodgate for adjustment requests from employees who were demoted years ago under the same policy, which is not an unreasonable concern.

In sum, the relevant facts surrounding the two cases cited by the grievant are not sufficiently similar to those surrounding the grievant's as to indicate improper or arbitrary inconsistencies in management's determinations. Nor does the decision appear to be one made without regard to the facts, by pure will or whim, or one no reasonable person could make after considering all available evidence.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in

²⁰ Third Step Response, dated January 31, 2003.

²¹ Letter to Director of EDR, dated March 4, 2003.

²² Memorandum to Agency Head from Human Resource Director, dated February 25, 2001.

²³ See Memorandum to Special Agent from Agency Head, dated June 6, 2002.

²⁴ Third Step Response, dated January 31, 2003.

writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

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