Issue: Qualification/grievant claims unfairly application of hiring and compensation policies; Ruling Date: January 9, 2004; Ruling #2003-177; Agency: Department of Corrections; Outcome: qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2003-177
January 9, 2004

The grievant has requested a ruling on whether his August 20, 2003 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. The grievant claims, in essence, that the agency has unfairly applied hiring and compensation policies.

FACTS

The grievant is employed as an HVAC Installation and Repair Supervisor at a DOC correctional facility (Facility A). In September 2002, the grievant transferred from Facility A to accept a similar position at another state agency (Agency B) with an annual starting salary of $34,500, a 15% increase over his then current salary. In January 2003, the grievant applied to return to Facility A to fill a vacant HVAC supervisor position.

The grievant was called by the Facility A's Human Resource Officer (HRO) to inform him of his selection and to discuss the employment offer. The facts regarding this and subsequent communications with the HRO are disputed. The grievant asserts that he was offered a salary of $34,500 by the HRO and was told that she would attempt to obtain an additional 10% which would bring his salary to $37,950.[1] Further, he claims that when he when he checked with the HRO to see if the salary of $37,950 had been approved, he was told that it had been and that an offer letter was not required.[2] On July 3, 2003, the facility submitted a Determining Rate of Pay Request form to the agency's central office requesting approval to award the grievant a starting salary of $37,950. On July 7, 2003, the grievant began work at Facility A.

The grievant failed to receive a regular paycheck for the July 31, 2003 payday due to a delay in submission of the necessary payroll documents. In correcting this omission, the Human Resources Office submitted a request for special payment to the central office listing $37,950 as the grievant's salary. As a result, the grievant was paid based on the $37,950 salary for the first two pay periods, which further confirmed to him that the

[1] The grievant was not provided an employment offer letter stating his starting salary. However, the grievant states in a September 25, 2003 e-mail to the Warden that he was offered a salary of $34,500 but the HRO allegedly stated that she "would attempt to obtain a salary of $37,950."
[2] September 25, 2003 e-mail from the grievant to the Warden.

higher starting salary had been approved. On August 15, 2003, however, the grievant was informed by the HRO that the agency central office had disapproved the facility's request to grant him the requested salary of $37,950. Accordingly, his staring salary would be established at $34,500, the same amount as his pre-employment salary.[3]

DISCUSSION

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. The grievant claims that the agency has unfairly applied policy by failing to honor a verbal starting salary offer made to him of $37,950. The agency contends that a starting salary of $37,950 was never approved in accordance with DOC policy and that the higher salary was paid for two pay periods due to administrative error committed by the HRO.

The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[4] The threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment act constituting 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."[5] A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse effect on the terms, conditions, or benefits of one's employment.[6]

In this case, the grievant had his pay reduced from an annual salary of $37,950 (which the agency avers was an erroneous figure) to $34,500. For purposes of this ruling, we will assume that this salary decrease constitutes an adverse employment action.

Policy 2.10, the Hiring Policy

One applicable state policy is the Department of Human Resource Management DHRM Policy 2.10, the Hiring Policy. Policy 2.10 sets forth a number of guidelines relating to employment offer letters. While DHRM Policy 2.10 does not expressly require that agencies provide employees with offer letters, during the course of this Department's investigation for this ruling, DHRM opined that it would consider an

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[3] As a result, the grievant was required to reimburse the excess salary he had received for two pay periods. (*See* Payroll Accounting Policy, Topic 50510).
[4] Va. Code § 2.2-3004(A).
[5] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[6] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

agency's failure to provide such a letter a misapplication of policy.[7] DOC maintains that it routinely provides such letters but admits that it deviated from its practice in this case and did not present one to the grievant.[8]

DHRM Policy 3.05, the Compensation Policy

The agency asserts that the "main reason for the denial of an additional 10% salary increase" was that the grievant had received a 10% increase when he moved from Facility A to Agency B.[9] DOC maintains that because the grievant received the 10% increase when he moved to Agency B, he is not eligible for another 10% increase.

State policy prohibits an employee from receiving pay increases totaling more than 10% of his or her salary during a given year *if* the increases are in the form of in-band adjustments. State policy does not preclude an employee from receiving more than 10% in increases in a given year if the increases are a result of multiple hiring actions such as promotions or, as was the case here, voluntary transfers competitive.[10] In such instances, an employee can receive up to a 15% increase with *each* hiring action. The grievant could and, according to him, did receive a 15% increase when he went to Agency B. He was also eligible for up to another 15% when he was offered the position at Facility A. Thus, the agency's "main reason for the denial of an additional 10% salary increase" is based on an incorrect reading of the state's compensation policy.

DOC Procedure 5-7.16, Notification of Applicants

DOC Procedure 5-7.16, *Notification of Applicants*, states that "no employing offer or salary should be made orally or in writing until approved by the required persons."[11] The Assistant Warden approved the $37,950 salary figure on July 1, 2003 but the agency's Human Resources Director did not until well after the grievant had begun work

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[7] DHRM Policy 2.10 sets forth a number of directives for the contents of employment offer letters but does not expressly state that they are required. Accordingly, during the investigation for this ruling this Department sought clarification from DHRM as to whether such letters are mandatory. In response DHRM stated that "although not spelled out it is strongly implied that offer letters be sent to selected applicants." DHRM further opined the "we would interpret that a lack of an offer letter would be a misapplication of the policy."

[8] DOC Procedure Number 5-7.16 (A) also states that "[i]t is the appointing authority's responsibility to notify all candidates referred of their selection or non-selection. This should be done in writing."

[9] Second Step Response from the Assistant Warden, dated September 3, 2003. The grievant disputes that he received a 10% increase when he moved to Agency A. He asserts that he received a 15% increase.

[10] Under Policy 3.05, "[w]hen an employee competes for a different position in the same Pay Band, the employee's salary is negotiable between the minimum of the Pay Band or Alternate Band up to 15% above the current salary. DHRM Policy 3.05 page 8 of 21. Such a hiring action is called a "Voluntary Transfer-Competitive." Id. Under Policy 3.05, "[w]hen an employee is promoted to a position in a different Role in a higher Pay Band, the promotional increase in negotiable between the minimum of the new Pay Band or Alternate Band up to 15% above the current salary." DHRM Policy 3.05 page 7 of 21. Such an action is described as a "Promotion" under Policy 3.05. Id.

[11] DOC Procedure 5-7.16(B)(4).

on July 7, 2003.[12] A reasonable reading of Procedure 5-7.16 instructs that offers should not be made until *all* required persons have approved the salary. It appears that in this case, not all required persons had approved the grievant's salary at the time the offer was made.

CONCLUSION

Based on: (1) the agency's admission that it failed to provide the grievant with an offer letter, (2) an offer being extended prior to approval by the Human Resources Director, and (3) the agency's "main" justification for denying the grievant a pay increase being based on an incorrect reading of state policy, this Department concludes that there remain questions regarding whether the agency may have misapplied or unfairly applied state and agency policy. Accordingly, this Department concludes that a further exploration at hearing is justified and the grievance is therefore qualified. This qualification ruling in no way determines that the agency's actions constituted an unfair application or a misapplication of policy; only that further exploration of the facts by a hearing officer is appropriate.

For further information, please refer to the enclosed sheet.

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Claudia T. Farr
Director

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June M. Foy
EDR Consultant, Sr.

[12] On August 25, 2003, over a month after the grievant began work, the agency's Human Resources Director signed the grievant's Determining the Rate of Pay Request. The HRO reports that normally the HR Director e-mails approval to the facility HRO but, in this case, no such e-mail was sent.