

Issue: Qualification/duties being performed without compensation; Ruling Date: April 27, 2004; Ruling #2003-476; Agency: Department of Corrections; Outcome: not qualified. Appealed in Circuit Court for Lunenburg County; Decision entered on June 22, 2004; Reversed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2003-476
April 27, 2004

The grievant has requested a qualification ruling on whether his March 14, 2003 grievance with the Department of Corrections (DOC or the agency), qualifies for hearing. The grievant claims that he performs the duties of a DOC correctional officer without appropriate compensation and that others in his position at other facilities have not been given such duties.¹ For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Correctional Enterprises (CE) Production Supervisor with DOC. Prior to their removal, two full-time correctional officers were employed in the Virginia Correctional Enterprises (VCE) shop in which the grievant works. When budget cuts forced the removal of these correctional officers from the VCE shop, the grievant assumed additional responsibilities.² Specifically, the grievant claims he is required to perform all duties of a correctional officer in addition to his duties as a CE Production Supervisor.

In this case, the grievant claims that he has been treated differently by being given the responsibilities of a correctional officer, in contrast to VCE Production Supervisors at other DOC facilities who have not been asked to assume similar duties. Moreover, the grievant maintains that he is performing correctional officer duties without appropriate compensation.³ As relief, the grievant seeks an increase in salary and coverage under the provisions of the Virginia Law Officers' Retirement System (VALORS).⁴

¹ During this Department's investigation, the grievant further alleged that removal of correctional officers has created a dangerous environment. However, this issue was not on the grievant's Form A and thus will not be addressed in this ruling.

² Since the filing of this grievance, one correctional officer has been restored to his post at the VCE Shop where the grievant works.

³ While not specifically stated on his Form A, the grievant's request for an increase in salary implies that he is challenging his current salary given his assumption of additional duties.

⁴ The 1999 General Assembly passed the Virginia Law Officers' Retirement System (VALORS), which became effective on October 1, 1999. VALORS allows those employees covered by the law to retire with unreduced benefits at age 50 with 25 years of service (as compared with regular service retirement which provides unreduced benefits at age 65 with 30 years of service). Additionally, those employees with 20 years of service in a covered hazardous duty position are eligible to receive a supplement to their retirement

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁵ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the establishment or revision of compensation 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.⁶

The grievant has not asserted that his alleged differential treatment is discriminatory, retaliatory or disciplinary. While not specifically stated on his Form A, the grievant's assertion that he is required to perform correctional officer duties while other VCE Production Supervisors at other facilities are not, is appropriately viewed as claim of unfair application of policy. Moreover, while the grievant did not expressly cite a misapplication of the state's compensation policy, a fair reading of the grievance makes out a claim that the grievant's current duties warrant a review of his compensation as a CE Production Supervisor under state and agency policy.

For a misapplication or unfair application of policy claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy.

Different Treatment- Unfair Assignment of Additional Duties

Under state policy, the Department of Human Resources Management (DHRM) Policy 1.40, DOC is required to develop Performance Plans for each classified position, identifying the core responsibilities, special projects, and performance measures for the incumbent during the performance cycle.⁷ Inherent in this authority is the discretion to change the core responsibilities of a position to ensure the most effective and efficient operation of the facility.⁸

until age 65. Va. Code § 51.1-211. Correctional officers as the term is defined in Va. Code § 53.1-1 were included among the categories of eligible employees. Va. Code § 51.1-212. Va. Code § 53.1-1 states that a "correctional officer" is 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." While it appears the grievant maintains immediate control, supervision and custody of prisoners, he is not a duly sworn employee of the Department of Corrections and thus would not be entitled to VALORS.

⁵ See Va. Code § 2.2-3004(B).

⁶ Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1 (c), page 11.

⁷ See DHRM Policy 1.40, *Performance Plan*, page 3.

⁸ See DHRM Policy 1.40, *Changes to the Performance Plan During the Performance Cycle*, page 4.

In this case, budgetary constraints have forced a reduction in security personnel at the grievant's facility. As a result, the grievant has been required to perform additional duties that would normally be performed by security personnel. While the grievant may believe that he has been treated unfairly in contrast to others who occupy the same position at other facilities, the grievance presents no evidence that any mandatory policy provision was violated. Likewise, there is no evidence that the agency's actions in this case are so unfair as to amount to a disregard of the intent of performance and planning policy. What may be appropriate for one facility may not be appropriate for other facilities. According to DHRM, the state agency charged with the promulgation and interpretation of policy, different facilities and divisions may adopt differing policies so long as those policies are consistent with state policy.⁹ Thus under the circumstances presented here, the agency's actions do not constitute an unfair application of policy.

Misapplication of Compensation Policy

The primary policy implicated in this grievance is Department of Human Resource Management (DHRM) Policy 3.05, which, pursuant to the Commonwealth's new compensation plan, requires all agencies, among other things, to develop an agency Salary Administration Plan (SAP).¹⁰ A SAP outlines how the agency will implement the Commonwealth's compensation management system, and is "the foundation for ensuring consistent application of pay decisions."¹¹ DOC has complied with this requirement by developing a SAP to address its pay practices. Importantly, DOC's SAP allows for an assessment of each employee's performance and duties and provides the agency with the flexibility to adjust salaries when justified. Specifically, agency personnel rely upon the following factors to determine appropriate pay practices: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification and license; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long term impact; and (13) current salary.¹² With these factors in mind, DOC *may* approve a salary adjustment on a temporary or permanent basis, including awarding an in-band adjustment to deserving employees.¹³ Additionally, under DHRM Policy 3.05, management is granted the flexibility to provide potential salary growth and career progression through the use of in-band adjustments

⁹ See EDR Qualification Ruling of Director #2003-109, September 4, 2003, which recognized that DHRM has opined that different facilities and divisions may implement differing policies so long as they are consistent with state policy.

¹⁰ See generally, DHRM Policy 3.05 (effective 9/25/00, revised 3/01/01). The SAP "addresses the agency's internal compensation philosophy and policies; responsibilities and approval processes; recruitment and selection process; performance management; administration of pay practices; program evaluation; appeal process; EEO considerations and the communication plan." DHRM Policy 3.05, page 1 of 21.

¹¹ DHRM Policy 3.05, page 1 of 21.

¹² See Department of Corrections Salary Administration Plan.

¹³ Generally, in-band adjustments for non-security personnel are considered on a quarterly basis and "must be approved by the Organizational Unit Head, Regional Director, Regional Administrator, and Deputy Director using the thirteen (13) pay factors and are a shared responsibility with the Department's Human Resources Unit, and the Budget Office." See Department of Corrections Salary Administration Plan.

("IBAs") to an employee's salary.¹⁴ Under Commonwealth policy, management has broad discretion as to when it utilizes IBAs. Additionally, under DHRM policy, agencies have the duty to continuously review agency compensation practices and actions to ensure that similarly situated employees are treated the same.¹⁵

Here, it does not appear as though the agency misapplied any *mandatory* state or agency policy provision by not providing the grievant with a salary adjustment when he acquired additional duties. The agency admits that since the removal of correctional officers from the VCE shops, Production Supervisors are responsible for greater supervision of inmates and must perform some shake downs of inmates upon their entrance and exit from the shop. However, while the agency recognizes that current compensation policies and procedures allow for salary increases if initiated and supported by management, the agency has chosen not to invoke such increases at this time. State policy accords great deference to management's exercise of judgment with respect to compensation decisions and this Department has long held that a hearing officer may not simply substitute his or her judgment for that of management regarding such decisions.

Likewise, there appears to be no evidence of an unfair application of policy in this case. Here, budgetary constraints forced a reduction in security personnel at the grievant's facility. As a result, the grievant has been required to perform additional duties that would normally be performed by security personnel. While the grievant may believe that he has been treated unfairly as a result of the change in his core responsibilities without a commensurate pay increase, the grievance presents no evidence that any policy was applied unfairly. As discussed above, what may be appropriate for one facility may not be appropriate for other facilities. Moreover, there is no evidence that any similarly situated CE Production Supervisors at the grievant's facility have been treated more favorably than he by receiving increased pay for the assumption of correction officer duties. Therefore, for all the reasons set forth above, this grievance is not qualified for hearing.¹⁶

¹⁴ An IBA is a discretionary non-competitive salary increase of 0-10% of an employee's current salary. IBAs may be awarded for the following reasons: (1) the employee has assumed a new higher level of duties and responsibilities that are critical to the operations of the agency, (2) the employee uses new knowledge and skills, which benefit the state, that were acquired through job-related training, education, certification and/or licensure, (3) to prevent employees from leaving the agency in high visibility occupations that have not been as competitive with the marketplace, and (4) to align an employee's salary more closely with those of other employees within the same agency who have comparable levels of training and experience, similar duties and responsibilities, similar performance and expertise, and/or knowledge and skills. DHRM Policy 3.05, page 11 of 21.

¹⁵ See DHRM Policy 3.05, page 1 of 21. Again, it should be noted that DHRM has implicitly held that employees who work at different facilities are not similarly situated by holding that divisions and facilities may adopt differing policies so long as these divergent policies are consistent with state policy.

¹⁶ To the extent the grievant's claim can be viewed as a challenge to his current classification, such a challenge would also fail. The Commonwealth's classification plan "shall provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title." Va. Code § 2.2-103(B)(1). This statute evinces a policy that would require state agencies to allocate positions having substantially the same duties and responsibilities to the same role. Importantly, the grievance procedure accords much deference to management's exercise

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 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.

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Director

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of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. Accordingly, this Department has long held that a hearing officer may not substitute his or her judgment for that of management regarding the correct classification of a position. *See* EDR Ruling No. 2001-062 (July 18, 2001). Thus, a grievance that challenges the substance of an agency's assessment of a position's job duties does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions within the agency or that the assessment was otherwise arbitrary or capricious (i.e. a decision made in disregard of the facts or without a reasoned basis). *See Grievance Procedure Manual* § 9, page 23. In the present case, the grievant has assumed additional responsibilities since the removal of correctional officers from his facility. Such responsibilities include greater control and supervision over the inmates. According to his Employee Work Profile (EWP), the purpose of the grievant's position is to train, supervise and evaluate inmate workers as well as ensuring safety of shop operation. Given the breadth of the range of duties contemplated in the grievant's role as CE Production Supervisor, it does not appear that the grievant is working outside of the scope of his job classification by assuming additional inmate control responsibilities. Further, it does not appear that the grievant's classification as a CE Production Supervisor is plainly inconsistent with other similar decisions within the agency or that the assessment is otherwise arbitrary or capricious (i.e. a decision made in disregard of the facts or without a reasoned basis).