

Issue: Qualification/misapplication of transfer and promotion policies; Ruling Date: September 9, 2004; Ruling #2004-679; Agency: Virginia State Police; Outcome: not qualified. Appealed in Patrick County Circuit Court, Case #Ch04-4678; Decision: Affirmed; Entered November 19, 2004.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia State Police  
No. 2004-679  
September 9, 2004

The grievant has requested a ruling on whether his January 29, 2004 grievance with the Virginia State Police (VSP or the agency) qualifies for a hearing. The grievant claims that the agency misapplied its transfer and promotion policies. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by VSP as a Master Trooper. In 1992, the grievant submitted a request to transfer to the agency's Auto Theft Unit "should it be expanded to include the position of Trooper" in Division A. At the time the grievant submitted this request, there was no trooper position in the Auto Theft Unit assigned to Division A. Despite the fact that the position to which the grievant sought transfer did not exist, the agency accepted the request and maintained it on file.

On November 25, 2003, the agency issued a job posting for a newly-created, temporary Trooper-Agent position in the Auto Theft Unit. This new position was to be assigned to the location previously requested by the grievant. The posting stated that Master Troopers could apply for the new position, but that there would be no pay increase for any Master Trooper selected for the position, as such a move would be "lateral."

The job duties of the newly-created Trooper-Agent position differ significantly from those of the grievant's present position. The grievant currently works as a "road trooper." In this capacity, his responsibilities include enforcing traffic laws, traffic management, and investigating car crashes and criminal complaints. In contrast, the duties of the Trooper-Agent position in the Auto Theft Unit include conducting educational programs for the general public about auto theft prevention initiatives; conducting auto theft enforcement training programs for public agencies and law enforcement officers; investigating incidents of auto theft, including conducting salvage yard examinations and vehicle examinations; and promoting auto theft prevention programs through public relations efforts.

After the grievant learned of the job posting for the Trooper-Agent position, he wrote to the agency asking to be transferred. The agency denied the grievant's request

and instead selected a number of applicants, including the grievant, to be interviewed. The grievant subsequently learned that another candidate had been promoted into the position.

The grievant contends that agency policy has been to give lateral transfers priority over promotions in filling positions, and that under this policy, he should have received the Trooper-Agent position automatically, without the agency opening up the position to other applicants. While the agency agrees that its unwritten policy is to look first to transfers in filling most existing vacant positions, it disagrees that this policy was applicable to the grievant's transfer to the Auto Theft Unit, because the Auto Theft Trooper-Agent position was new and specialized. Where a vacancy occurs in a new and specialized position, the agency asserts, its policy is not to fill the position automatically through any pending transfer requests, but rather to open the position to applicants and then to select the best-suited candidate.

#### DISCUSSION

The grievance procedure recognizes management's exclusive right to manage the operations of state government, including the hiring or promotion of employees within an agency.<sup>1</sup> Inherent in this right is the authority to weigh the relative qualifications of job applicants and determine the "best-suited" person for a particular position based on the knowledge, skills, and abilities required. Grievances relating solely to the contents of personnel policies and the hiring of employees within an agency "shall not proceed to a hearing."<sup>2</sup> Accordingly, a grievance challenging the selection process does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.<sup>3</sup> In this case, the grievant claims that the agency misapplied its transfer and promotion policies.

For an allegation of misapplication 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. In this case, the grievant has failed to show such facts exist.

While the grievant alleges that the agency violated its policy of giving transfers precedence over promotions, there is no evidence to support his contention that this policy applied to the position he sought. The agency has shown that its written policy on

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(C).

<sup>3</sup> *Grievance Procedure Manual* § 4.1(c). We note that a mere misapplication of policy in itself is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions." Va. Code § 2.2-3004(A). For purposes of this analysis, we assume, without deciding, that denial of the requested transfer to a specialized unit would constitute an adverse employment action.

assignments and transfers, General Order No. 16, mandates that new and specialized positions, such as the Trooper-Agent position sought by the grievant, be advertised in writing prior to being filled.<sup>4</sup> The agency has also shown that its actions with respect to the Trooper-Agent position were consistent with its past practice in filling other specialized positions. The grievant has not presented any evidence to rebut that presented by the agency, and he is unable to identify any circumstance in which the transfer policy he cites was applied to a new and specialized position.

Moreover, while the grievant did not expressly assert that the agency unfairly applied its policy on lateral transfers, we note that there is no evidence that the agency has applied this policy inconsistently. The agency has presented evidence showing that it has not automatically filled other specialized positions with transfers, but has instead advertised those positions and engaged in a selection process. At the same time, the grievant is unable to identify any comparable position which was filled through the transfer policy, rather than through advertisement and selection. Accordingly, as there is no evidence to suggest that the agency misapplied or unfairly applied its lateral transfer policy in this case, this grievance does not qualify for a hearing.

#### 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 this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays 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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Claudia T. Farr  
Director

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<sup>4</sup> Department of State Police General Order No. 16, *Assignments and Transfers*, §§ 2(b) (requiring that specialized positions be advertised) and 2(c) (requiring that new positions be advertised). Although the policy lists three specific examples of specialized assignments—canine handler, SCUBA diver, and tactical team member—the agency has not treated this as an exclusive listing of those specialized assignments required to be advertised. The agency has also advertised for such specialized assignments as DARE instructor positions, positions in the Safety Division, and positions on the Governor's security detail.