Issue: Qualification/misapplication of policy re: geographic boundaries of division; Ruling Date: March 11, 2005; Ruling #2004-932; Agency: Virginia State Police; Outcome: misapplication of policy claim qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling Number 2004-932
March 11, 2005

The grievant has requested a ruling on whether his November 10, 2004 grievance with the Department of State Police (VSP or the agency) qualifies for a hearing. The grievant claims that the agency misapplied and/or unfairly applied state and agency policy by denying his request to live in Town C, which is within a 50-mile radius of his assigned division office, but not within the geographic boundaries of that division.

FACTS

The grievant is a lieutenant with VSP. In July 2003, he requested a transfer to Division Y. On October 25, 2004, he was transferred to Division Y on a full-time basis, assigned to the division office. Employees within Division Y receive a Northern Virginia compensation differential.

VSP regulates the location of a sworn employee's residence. Under the terms of General Order No. 16, a sworn employee transferred or assigned to a new station may not "take up permanent residence until such residence has been viewed by the immediate supervisor and approved by his/her division commander as to the desirability of the neighborhood, location and accessibility."[1]

On November 8, 2004, the grievant requested permission to establish his residence in Town C. Town C is within 50 miles of the Division Y field office but is outside the geographic boundaries of that division. At the time the grievant accepted the transfer to Division Y, he believed that under the terms of General Order No. 16, he was permitted to live outside the division's geographic borders, so long as he lived within 50 miles of the field office. At the time the agency denied the grievant's request to live in Town C, Paragraph 12.j of General Order No. 16 provided, in relevant part:

> Any sworn employee who is permanently assigned to Administrative Headquarters or to a field division office shall reside within a 50-mile radius of

[1] General Order No. 16, "Assignments and Transfers," dated October 1, 2004, at § 12.c.

> the office to which he/she is assigned. Division boundaries will not limit the aforementioned policy.
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> Paragraph 12.g of the same policy stated:
> All sworn employees assigned to Division [Y], excluding Commercial Vehicle Enforcement Officers, may live anywhere within the geographical boundaries of Division [Y].[2]

The agency denied the grievant's request to live in Town C. The agency advised the grievant that under General Order No. 16, he was required to live within the geographic boundaries of Division Y. On November 10, 2004, the grievant initiated a grievance challenging the agency's denial of his request.

The grievant argues that the agency's decision was a misapplication and unfair application of General Order No. 16 in effect at the time of the agency's denial. Specifically, he alleges that the express terms of the policy do not require him to live within the geographic boundaries of Division Y, but allow him to live anywhere within a 50-mile radius of the Division Y office. He also alleges that any policy requiring him to live within the boundaries of Division Y violates state compensation policy, because such a policy would in effect convert the compensation differential paid to Division Y employees into a cost-of-living subsidy.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the method, means, and personnel by which work activities are to be carried out 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 influenced management's decision, or whether state policy may have

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[2] Paragraphs 12.j and 12.g quoted above reflected significant revisions to General Order No. 16, adopted by the agency before the grievant's transfer. Prior to January 2004, the agency had required sworn employees assigned to a division office to live both within a 50-mile radius of that office and within the geographic territory of the division. *See* General Order No. 16, as revised October 1, 2003. In January 2004, the agency modified General Order No. 16 to provide that employees assigned to a field division need only live within a 50-mile radius of that office, without regard to division boundaries. *See* Informational Bulletin-2004-No. 4, dated January 27, 2004. The January 2004 modifications also provided that "[s]worn employees assigned to a division, area or duty post that receives differential pay will only be compensated the special rate of pay if they live within the geographical limits of their assignment." In December 2004, after the grievant initiated his grievance, the agency again revised the relevant portions of General Order No. 16 to include an explicit and unambiguous mandate that Division Y employees must live within the geographical boundaries of the division. *See* Informational Bulletin-2004-No. 46, dated December 22, 2004.

[3] *See* Va. Code § 2.2-3004(B).

been misapplied.[4] In addition, for a claim to qualify for hearing, a grievant must show that he suffered an adverse action affecting the terms and conditions of his employment.[5]

Misapplication of General Order No. 16

The grievant argues that under General Order No. 16, as that policy existed at the time he made his request to live in Town C, he was not required to live within the geographic boundaries of Division Y, but instead had the option of either living within a 50-mile radius of the Division Y office, as required by Paragraph 12.j, or living within the geographic boundaries of Division Y, as permitted by Paragraph 12.g. He notes that Paragraph 12.g does not state that employees "shall" live within Division Y, but rather states that they "may" do so.[6] Because General Order No. 16 did not explicitly require that he live within Division Y, the grievant alleges, the agency misapplied that policy by denying him permission to live within Town C.

In response, the agency argues that the intent of Paragraph 12.g is to require officers assigned to Division Y to live within the geographic boundaries of that Division. The agency states that the purpose of Paragraph 12.g is to minimize the perception of unfairness that could result if Division Y employees were to live within other divisions not covered by the Northern Virginia differential.

Although an agency's interpretation of its own policies is generally afforded great deference, that deference is not without limitation. This Department has previously held that where the plain language of an agency policy is capable of more than one interpretation, a hearing officer should give the agency's interpretation of its own policy substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.[7] Further, we have held that even where an ambiguous policy is otherwise enforceable, a hearing officer may consider whether the grievant had fair notice of the agency's interpretation.[8] In this case, we conclude that the grievant has raised a sufficient question as to whether the agency's interpretation is clearly erroneous or inconsistent with the policy's express language, and as to whether the agency failed to provide fair notice of its interpretation.

But that does not end the inquiry. To qualify for hearing, the grievance must also raise a sufficient question as to whether the agency's denial of his request to live in Town C constituted an "adverse employment action"[9] affecting the terms, conditions or benefits

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[4] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1 (C).
[5] *See* Ruling Nos. 2004-624, 648; 2004-871.
[6] This Department has previously recognized that the use of the term "may" indicates that an action is permitted, but not required. *See, e.g.*, Ruling No. 2002-005, 2002-088; Ruling No. 2002-236
[7] *See* Ruling No. 2001-064.
[8] *Id.*
[9] 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. Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

of his employment.[10] The grievant claims, in effect, that in misapplying the terms of its own policy, the agency's denial of his request to live in Town C adversely affected a term or condition of his employment: his ability to reside in Town C under the express language of General Order No. 16 in effect at the time of the denial.

We have previously noted that to meet the adverse employment action standard, an action "must be adverse in the right way"—specifically, the action must have an adverse effect on a term or condition of grievant's employment, rather than simply an adverse personal consequence.[11] Thus, for example, this Department has previously held that a shift change resulting in negative personal consequences for a grievant was not an adverse employment action, because it did not result in a change in a term or condition of employment.[12] Likewise, a transfer resulting in a longer commute did not constitute an adverse employment action, as there was no evidence that a term, condition or benefit of the grievant's employment was adversely affected.[13]

This case is distinguishable from these previous rulings because here, by issuing General Order No. 16, VSP explicitly made the location of the grievant's residence a requirement (*i.e.*, term or condition) of employment. This is entirely within VSP's authority. However, once an agency exercises its authority to create a term or condition of employment, an alleged misapplication of that term or condition may be viewed as an adverse employment action, not a mere personal consequence. [14] And while not every management action resulting in a change in a condition of employment is so significant as to rise to the level of an adverse employment action, we find that under the particular facts of this case, the alleged misapplication of the residency policy, if established, would constitute an adverse employment action.

Misapplication of DHRM Compensation Policy

The grievant has also alleged that the agency's interpretation of General Order No. 16 violates DHRM Policy 3.05, "Compensation." The grievant argues that by requiring employees to live within Division Y, the agency treats the salary differential applicable to Division Y employees as a cost-of-living adjustment, rather than as the competitive hiring and retention measure intended by DHRM. He cites in support of this argument the language of Policy 3.05, as well as the DHRM Human Resources Management Manual. The agency responds that the purpose of its policy regarding Division Y employees is to prevent the perception of unfairness that could result if

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[10] *Grievance Procedure Manual*, § 4.1, pages 10-11. See also Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[11] *See* Ruling No. 2004-768.
[12] *See* Ruling No. 2004-768.
[13] *See* Ruling No. 2002-111.
[14] *See generally* Shlay v. Montgomery, 802 F.2d 918, 919 (7th Cir. 1986) (recognizing that residency requirement was a condition of employment); Andre v. Board of Trustees, 561 F.2d 48, 50 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

Division Y employees were to live within other divisions not covered by the Northern Virginia differential.

During the course of its investigation, EDR requested guidance from a DHRM policy analyst regarding the alleged inconsistency of the agency's policy with DHRM policy. DHRM advised EDR that it had consulted with VSP with respect to its residency policy and that it "condoned" the policy adopted by the agency. As DHRM, the agency charged with promulgation and interpretation of state policy, has reviewed the facts of this case and found no inconsistency between state and agency policy, this Department denies qualification on this issue.[15]

CONCLUSION

For the reasons discussed above, this Department qualifies for hearing the grievant's claim that the agency misapplied General Order No. 16 then in effect in refusing to allow him to live in Town C. This qualification ruling in no way determines that the agency's action was a misapplication of policy or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

For additional 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 to the circuit court the denial of qualification of his claim that the agency's interpretation of General Order No. 16 is inconsistent with DHRM policy, he 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 notifies the agency that he does not wish to proceed.

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Claudia T. Farr
Director

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Gretchen M. White
EDR Consultant

[15] Va. Code § 2.2-1201(13) states that DHRM shall "[d]evelop state personnel policies and, after approval by the Governor, disseminate and interpret state personnel policies and procedures to all agencies." Section 2.2-1201(13) further states that "The [DHRM] Director of the Department shall have the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies." *See also* Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).