Issue: Qualification/Compensation-In-band adjustment/Work Conditions/Supervisor-Employee Conflict; Ruling Date August 19, 2005; Ruling #2005-1071; Agency: Virginia Department of Transportation; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2005-1071
August 19, 2005

The grievant requests a qualification ruling in her May 4, 2005 grievance with the Department of Transportation (VDOT or the agency). The grievant's May 4th grievance claims that (1) VDOT has misapplied or unfairly applied policy by revoking her October 10, 2004 in-band salary adjustment and requiring her to reimburse the agency for funds dispersed in error; (2) under Virginia Code § 2.2-804, agency management should be held responsible for the payment error;[1] and (3) the agency has engaged in harassing behavior towards her.[2] For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as an Administrative Office Specialist II with VDOT. On April 19, 2002, shortly after she began her employment with VDOT, the grievant was terminated for inadequate work performance. The grievant subsequently sought an investigation of her termination by her district Equal Opportunity (EO) Office. On August 7, 2002, the grievant was notified by human resources that she was being offered the opportunity to return to her former position and would be provided backpay and restoration of benefits for the period of her termination. Likewise, on August 21, 2002, the EO office

[1] Va. Code §2.2-804 states:

> "[i]f any officer or employee of the Commonwealth, whether or not exempt from the provisions of Chapter 29 (§2.2-2900 et seq.) of this title, contrary to any applicable statute, regulation or written policy of the Commonwealth, obtains or authorizes any other officer or employee to obtain any compensation or other payment to which an employee is not entitled, and upon written request of his employer, fails or refuses to return or reimburse such compensation or payment, then both the employee who received the payment to which he was not entitled and the employee who authorized the payment shall be liable for repayment to the employer. Liability shall not attach unless such authorization was given with actual or constructive knowledge that the recipient employee was not entitled to such compensation or payment."

[2] During this Department's investigation, the grievant further claimed misapplication or unfair application of policy because she is not compensated for the procurement duties that she performs on a regular basis. However, the grievant failed to raise the issue of misapplication or unfair application of policy with regard to her procurement duties on Form A or in an attachment thereto. As such, this ruling will not address the grievant's claim. *See Grievance Procedure Manual* § 2.4 ("[o]nce the grievance is initiated, additional claims may not be added.")

notified the grievant that its investigation revealed that VDOT's Probationary Period Policy #1.45 was not followed and as such, the grievant was wrongfully terminated. The EO investigation report further revealed that the grievant, a black female, was treated differently than similarly situated white female employees. For instance, a white female employee with similar performance deficiencies was given an opportunity to improve her performance while the grievant was terminated. As a result, the grievant was reinstated to her former position on August 26, 2002.

On June 25, 2004, the grievant was granted a 10% in-band salary adjustment for a change in duties. The grievant was subsequently granted another 10% in-band salary adjustment on January 4, 2005 with a retroactive effective date of October 10, 2004. The basis of this second in-band adjustment was internal salary alignment. The agency subsequently discovered that the second in-band salary adjustment was granted in violation of policy. In an effort to avoid having to revoke the October 10th in-band adjustment, VDOT sought an exception to the compensation policy from the Department of Human Resource Management (DHRM). DHRM denied the agency's in-band adjustment request because the request did not meet the criteria for an exception. As a result, the grievant was notified that she received an overpayment of $842.54 and that pursuant to Department of Accounts (DOA) policy she would have to repay the wages dispersed in error.

DISCUSSION

Misapplication or Unfair Application of Policy

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as 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 or unfairly applied.[4] In this case, the grievant claims that the agency misapplied policies and procedures by revoking her in-band adjustment effective October 10, 2004 and requiring that she reimburse the agency for its mistake. The grievant further claims that the agency unfairly applied policy and procedures by granting other VDOT employees more than one in-band adjustment in a fiscal year in excess of 10%, but unlike the grievant, these employees were not required to repay the agency any overpayment received.

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.

---

[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1 (c).

The primary policy implicated in this grievance is Department of Human Resource Management (DHRM) Policy 3.05, which, pursuant to the Commonwealth's compensation plan, requires all agencies, among other things, to develop an agency Salary Administration Plan (SAP).[5] 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."[6] The agency has complied with this requirement by developing a SAP to address its pay practices.

Both state and agency policy provide the agency with the flexibility to adjust salaries when justified. One way to adjust an employee's salary is by granting her an in-band adjustment. Under Commonwealth and agency policy, management has broad discretion as to when it utilizes in-band salary adjustments. However, despite its broad discretion in determining whether an employee is deserving of an in-band adjustment, both state and agency policy prohibit an agency from granting an employee in-band pay adjustments totaling more than 10% of his or her salary during a given fiscal year.[7] As a general rule, the state's fiscal year commences on the first day of July and ends on the 30th day of June.[8] However, due to the state's lag pay system,[9] DHRM Policy 3.05 defines a fiscal year for in-band adjustment purposes as June 25th through June 24th of the following year.[10]

In this case, the grievant was granted a 10% in-band adjustment effective June 25, 2004 and another 10% in-band adjustment effective October 10, 2004. Both of these salary adjustments occurred within the 2005 fiscal year for purposes of in-band adjustments (June 25, 2004 – June 24, 2005) and exceeded the 10% in-band adjustment maximum allowed in a given fiscal year. Accordingly, the agency erred by granting the grievant the October 10, 2004 in-band adjustment and allowing the grievant to keep the second 10% in-band adjustment (in the absence of an exception to policy from DHRM)[11] would be in violation of policy. As such, it appears that the agency's revocation of the October 10th in-band adjustment was appropriate and consistent with policy.

The question remains, however, whether the agency misapplied or unfairly applied policy by requiring the grievant to reimburse the agency compensation received as a result

---

[5] *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.
[6] DHRM Policy 3.05, page 1 of 21.
[7] *See* DHRM Policy 3.05, page 11 of 22 and VDOT Salary Administration Plan, Attachment I, *Pay Practice Administration Guidelines for Classified Employees.*
[8] *See* Va. Code § 2.2-805.
[9] "Lag pay" means that there is a lag between the day upon which state employees are paid and the last day they worked. For instance, under the state's lag pay system, an employee would be paid on July 1st for days she worked from June 10th through June 24th. A new pay period would start on June 25th and the employee would be paid on July 16th for worked performed from June 25th through July 9th.
[10] *See* DHRM Policy 3.05, page 11 of 22.
[11] *Id.*

of VDOT's erroneous salary adjustment. There is no applicable VDOT or Department of Human Resource Management (DHRM) policy regarding reimbursement of wages dispersed in error. It appears that the only applicable policy in this case is the Department of Accounts' (DOA's) Topic 50510, the Payroll Accounting policy. Under Topic 50510, agencies are **required** to collect overpayments.[12] As to procedure, Topic 50510 indicates that employees "should" first be notified of the overpayment and given repayment options to include full repayment by personal check or a mutually agreeable payroll docking schedule.[13] If by payroll docking, repayment may not occur over a longer period than the overpayment occurred.[14] Although Topic 50510 establishes procedural guidelines, it creates no policy mandate outlining the specific steps agencies must take in obtaining reimbursement from employees.

In this case, the agency was required to collect from the grievant an overpayment of $842.54 as a result of the erroneous in-band adjustment. To offset the overpayment, the grievant was granted a $1,000.00 bonus pursuant to the agency's recognition program. The overpayment amount of $842.54 was deducted from the $1,000.00 bonus and applicable taxes deducted from the balance. After all applicable deductions, the grievant received a check in the amount of $97.00.

Based on the foregoing, this Department concludes that VDOT did not violate any mandatory policy provision by rescinding the October 10, 2004 in-band salary adjustment and requiring the grievant to reimburse the agency for the payment error. Rather, it appears that the agency's method of collection was in accordance with policy and reasonable and fair under the circumstances. In addition, while the grievant was understandably upset by the agency's mistake, it does not appear that the agency's actions were so unfair as to amount to a disregard of the intent of the applicable policies. During this Department's investigation, the grievant declined to identify those employees she claims received in excess of 10% in a fiscal year, but were not required to reimburse the agency for any overpayment. The agency denies the grievant's allegation and asserts that there was one other person that received more than 10% in a fiscal year, but was required to reimburse the agency for the overpayment.

In sum, the grievant has failed to produce sufficient evidence in support of her claim that she was treated unfairly, inconsistently, and/or in violation of policy. Accordingly, the grievant's claim of misapplication and/or unfair application of policies and procedures does not qualify for hearing.

Violation of Virginia Code § 2.2-804

The grievant further claims that under Virginia Code § 2.2-804, agency management should be held liable for reimbursement to the agency for the payment error.

[12] Topic 50510, page 5.
[13] *Id.*
[14] *Id.*

This Department has no authority to assess the applicability of Virginia Code § 2.2-804 to this case, nor enforce the provisions of Virginia Code § 2.2-804. Thus, while this issue appropriately proceeded through the management resolution steps for a possible resolution,[15] it does not qualify for a hearing.

Retaliatory Harassment/Harassment Based on Race

The grievant claims that since her reinstatement to employment with VDOT in 2002, she has been subjected to constant harassment because of her race and her previous protected activity, namely complaining of racial discrimination when she was terminated in 2002.[16]

For a claim of retaliatory or racial harassment to be qualified for hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on her prior protected activity or race; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[17] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[18]

In support of her claim, the grievant cites to numerous examples of alleged discriminatory and retaliatory acts. Such examples include the following: (1) on the day she was reinstated to employment with VDOT, the grievant was told that she had displayed a "defensive attitude" in the past; (2) shortly after her re-employment, VDOT discovered that the grievant received unemployment compensation while terminated and required her to repay the agency for any overpayment she received from VDOT; (3) a confidential payroll document concerning the grievant was faxed to the grievant's office without a cover sheet and no one was expecting it; (4) in her 6-Month Probationary Progress Review, the grievant's supervisor commented on many areas in which the grievant could improve; (5) the grievant's supervisor sent her an e-mail on June 7, 2005 directing her to do as she was asked;[19] (6) the grievant's supervisor made charges to the grievant's American

---

[15] Va. Code § 2.2-3004 (A).

[16] For purposes of the grievance procedure, protected activity includes "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[17] For cases discussing retaliatory harassment s*ee generally* Von Gunten v. State of Maryland, 243 F.3d 858, 865, 869-70 (4th Cir. 2001); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791-92 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1245-46 (9th Cir. 2000); Gunnell v. Utah Valley State College, 152 F.3d, 1253, 1264 (10th Cir. 1998). For cases discussing racial harassment s*ee* Spriggs v. Diamond Autoglass, 242 F.3d 179 (4th Cir. 2001).

[18] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S.Ct. 367 (1983).

[19] It should be noted that this e-mail was sent after the grievant initiated her May 4, 2005 grievance.

Express card without the grievant's knowledge; (7) the grievant's supervisor questioned the grievant regarding her use of leave and failure to enter leave in the system; (8) the grievant's October 10, 2004 in-band adjustment was revoked and she was required to repay the agency for any overpayment received; and (9) on July 8, 2005, the grievant received an inaccurate written counseling memorandum for poor performance and failure to follow her supervisor's instructions.

The grievant has demonstrated that the conduct alleged was unwelcome, thus satisfying the first element of both her racial and retaliatory harassment claims. Moreover, the grievant's initiation of an EO investigation is a protected activity.[20] In addition, the grievant has presented evidence demonstrating that the cited conduct creating the alleged hostile work environment was imputable to the agency.[21] Furthermore, the 2002 EO investigation, by concluding that the grievant had previously suffered disparate treatment by VDOT management on the basis of race, presents evidence that could support grievant's position that management's subsequent behavior could also have been based upon the grievant's race.

However, this Department concludes that the acts taken by her supervisor and other members of VDOT management described above are not "sufficiently severe or pervasive to alter her conditions of employment" so as to present a claim of retaliatory or racial harassment under the applicable legal standard.[22] First, while the grievant was told that she had displayed a "defensive attitude," it appears the agency made this statement in an effort to explain its behavioral expectations upon the grievant's reemployment with VDOT. Specifically, upon her return to employment with VDOT on August 26, 2002, the grievant was asked to meet with her supervisor and a human resource staff member to sign forms and distribute information and to discuss agency expectations, as well as the grievant's duties and responsibilities. At this meeting, the reasons for the grievant's termination were discussed. The grievant's supervisor stated that it was her understanding that the grievant's principal complaint regarding her termination for poor performance was that she was not given notice of her inadequate performance, nor a chance to improve. The grievant's supervisor proceeded to explain to the grievant that the issues resulting in her termination involved her "defensive attitude" when receiving feedback or instruction and provided an example of such behavior.

---

[20] *See Grievance Procedure Manual* §4.1(b)(4). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

[21] The conduct claimed by the grievant was purportedly committed by employees in supervisory roles. Where harassment is committed by supervisory employees, "[e]mployers are generally presumed to be liable." White v. BFI Waste Services, LLC, 375 F.3d at 299 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998)).

[22] *See* Von Gunten v. State of Maryland, 243 F.3d 858 (4th Cir. 2001) citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367 (1993) ("[f]or a hostile work environment claim to lie there must be evidence of conduct 'severe or pervasive enough' to create 'an environment that a reasonable person would find hostile or abusive'.")

With regard to the grievant's assertion that the deduction of interim earnings from her back pay distribution was harassment, this Department concludes that the agency's actions were reasonable, especially in light of the fact that in some instances, it is required that an agency deduct interim earnings from its back pay distribution to reinstated employees.[23]

With regard to the grievant's challenge to her 6-month evaluation, this Department concludes that although the grievant perceives her 6-month evaluation as inaccurate, the evaluation did commend the grievant on her work performance, she received an overall contributor rating on the performance evaluation and she was permitted to attach a written challenge to the evaluation.

As to the grievant's assertion regarding the June 7, 2005 e-mail instruction to perform services, it appears that management was trying to sort out an inventory discrepancy regarding leased equipment. Specifically, in March 2005 the grievant was asked to identify leased equipment for which she is responsible. Due to an apparent omission from and/or error in the original inventory list, the grievant was subsequently asked in June 2005 to submit additional similar forms for leased equipment. Given her position that she had complied with the March 2005 request, the grievant questioned her supervisor as to the need for the June 2005 forms and failed to submit the forms by the deadline as instructed by her supervisor. Accordingly, the grievant's supervisor sent the grievant the June 7, 2005 e-mail explaining the need for the additional information and directed her to accomplish the requested task.

As to the grievant's assertion that her supervisor charges to the grievant's American Express card without her knowledge, the agency has provided evidence that tends to show that the grievant was given advance notice of the purchases that were charged to her card and that such charges were not based on a discriminatory or retaliatory animus. Specifically, in February 2005, the grievant's card was used to purchase certain telecommunications equipment. The grievant's American Express card was used for the purchase because although the grievant's supervisor has her own American Express card, the supervisor does not have procurement authority. The grievant is the only one in their department that holds both an American Express card and procurement authority. Further, after the order was completed, the supervisor sent the grievant an e-mail explaining the charge and ensuring the grievant that the appropriate documentation (i.e., receipts, packing slips, etc…) for the purchase will be provided to her. In her e-mail, the grievant's supervisor further states that she used the grievant's American Express number "as we discussed," thereby implying that the grievant had advance knowledge of the use of her American Express card. In sum, under the facts presented here, the circumstances

[23] Cf. DHRM Policy 1.60 § IX(B)(2)(b) ("[a] *hearing officer* award of back pay shall be offset by any interim earnings that the employee received during the period of separation, including unemployment compensation received from the Virginia Employment Commission.")

regarding charges made to the grievant's American Express Card simply do not appear to suggest a discriminatory or retaliatory intent.

With regard to leave, the grievant had inappropriately identified the type of leave taken on a leave slip and failed to timely enter all of her leave slips in the system. Accordingly, her supervisor instructed her to change the leave slip to accurately reflect the type of leave taken and to make sure that leave slips are entered in a timely manner. The supervisor's directives were appropriate especially in light of an agency's duty to maintain up-to-date and accurate leave records.[24]

With regard to the revocation of the grievant's October 10, 2004 in-band adjustment, this Department concludes that while the agency's mistake was unfortunate, as noted above, it was required to collect any overpayment from the grievant and thus, it does not appear that requiring the grievant to reimburse the agency for such overpayments was personal or intended to harass.

Further, even if we were to construe the facts in a light most favorable to the grievant with regard to the remaining acts (i.e., the confidential payroll fax and the counseling memo) such acts, without more, lack the requisite severity and intimidation to meet the high legal standard for "hostile or abusive."[25]

In sum, the grievant has failed to present sufficient evidence that management's actions have unreasonably interfered with her work performance. On the contrary, in 2004 the grievant received an overall rating of Extraordinary Contributor on her annual performance evaluation, thus negating any claim that her work performance has suffered as a result of management's alleged discriminatory and retaliatory acts. Accordingly, the grievant's claim of retaliatory and discriminatory harassment do not qualify for hearing.

Finally, we note that in light of what appears to be ongoing conflict between the grievant and her supervisor, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, call 804-786-7994.

---

[24] *See* DHRM Policy 4.30 §IV(B).

[25] While each decision must be made on a case-by-case basis, courts generally require an employee to be subjected to frequent and significantly severe behavior in order to find a hostile or abusive work environment. For instance, in McGinist v. GTE Service Corp., the court found that management's alleged unwillingness to ensure that the employee's automobile received necessary maintenance, forcing the employee to work in dangerous situations, constant racial insults directed at the employee and preventing the employee from collecting overtime pay was enough to raise a genuine issue of material fact with regard to the existence of a racially hostile workplace. McGinist v. GTE Service Corp., 360 F.3d 1103 (9th Cir. 2004).

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, she 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 she does not wish to proceed.

_____
Claudia Farr
Director

_____
Jennifer S.C. Alger
EDR Consultant