

Issue: Qualification/Compensation/salary dispute; Ruling Date: December 6, 2005;  
Ruling #2006-1139; Agency: Department of Juvenile Justice; Outcome: not qualified



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Juvenile Justice  
Ruling No. 2006-1139  
December 6, 2005

The grievant has requested a determination on whether her August 12, 2005 grievance with the Department of Juvenile Justice (DJJ or the agency) qualifies for a hearing.<sup>1</sup> The grievant claims that the agency misapplied and/or unfairly applied policy by removing 4.5% from her salary after she was involuntarily transferred to another DJJ facility.<sup>2</sup> For the following reasons, this grievance does not qualify for a hearing.

**FACTS**

The grievant is employed as a Sergeant with DJJ. To address recruitment and retention problems at DJJ Facility A, a “geographic differential” or “special pay rate” for all security staff at that facility was proposed. The agency’s proposal was subsequently approved for implementation by the Department of Human Resource Management (DHRM) and the Secretary of Public Safety. In the agency’s proposal for this salary

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<sup>1</sup> In addition to denying the August 12<sup>th</sup> grievance for hearing, the agency head further cited the grievance with noncompliance with the grievance process. Specifically, the agency claims that the grievant is prohibited from challenging her February 7, 2005 transfer because such transfer occurred more than 30 calendar days prior to the initiation of her August 12, 2005 grievance. The grievant asserts, and the grievance seems to indicate, that she is not challenging the legitimacy of the February 7<sup>th</sup> transfer, but rather is challenging the removal of 4.5% from her salary as a result of the transfer. While the agency declined to address the transfer issue based on non-compliance with the 30-day rule, the agency did not appear to challenge the timeliness of the grievant’s claims as to her salary reduction. Moreover, the salary issue was discussed by respondents at each management step. As such, this ruling will address only whether DJJ improperly or unfairly removed 4.5% from the grievant’s salary.

<sup>2</sup> During the course of the grievance, the grievant further asserted that the agency was out of compliance with the hearing officer’s April 21, 2005 order in Case No. 8024 to reinstate the grievant to her former position and salary. Under the grievance procedure, if the grievant believes that the agency has not properly implemented the hearing officer’s orders, she may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final hearing decision, after which both parties should be able to present their respective arguments to the court. Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c). The court “shall award reasonable attorneys’ fees and costs to the employee if the employee substantially prevails on the merits” of her petition to the circuit court. Va. Code § 2.2-3006(E).

increase, as well as in a September 9, 1999 memorandum to all security staff at Facility A, the agency explained the reason for the “special pay rate” and stated that if an employee receiving the “special pay rate” transferred to another agency, institution or organizational unit or to a non-security position at Facility A, the “special pay rate” would be removed from their salary. Likewise, DHRM approved the “geographic differential” or “special pay rate” with the understanding that it would be removed upon transfer from Facility A to another facility. The “geographic differential” or “special pay rate” became effective on October 10, 1999.

On October 10, 2001, the grievant was transferred from another DJJ facility to Facility A. Upon her transfer to Facility A, the grievant received a 4.5% increase to her salary. In February 2005, the grievant was involuntarily transferred from Facility A to DJJ Facility B and 4.5% was subsequently removed from her salary. The grievant challenged the removal of the 4.5% from her salary by initiating her August 12, 2005 grievance.

### DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Thus, complaints relating solely to the revision of wages, salaries, and position classifications and the transfer and assignment of employees 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.<sup>4</sup>

In this case, the grievant contends that management misapplied and/or unfairly applied policy by removing 4.5% from her salary upon her transfer from Facility A to Facility B. More specifically, the grievant contends that the 4.5% adjustment to her salary was a “retention incentive”<sup>5</sup> and as such, not subject to removal when she was involuntarily transferred to Facility B. By removing the pay adjustment, the grievant asserts that the agency has treated her inconsistently from other similarly-situated DJJ employees. The agency claims that the 4.5% pay adjustment retained by the grievant

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<sup>3</sup> See Va. Code § 2.2-3004(B).

<sup>4</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1 (c).

<sup>5</sup> The Department of Human Resource Management (DHRM) Policy 3.05 allows agencies to offer recruitment and retention incentives for “situations where employees are extremely difficult to recruit and retain and critical to the agency’s mission and ongoing operations.” DHRM Policy No. 3.05, page 14 of 22 (effective 9/25/00, revised 4/25/05). In particular, “[r]etention bonuses are used to encourage current employees to remain in specific critical positions, Roles or Career Groups.” “Agencies may offer a retention bonus of up to \$10,000 during a fiscal year,” however “[t]he employee must agree to work for the Commonwealth and remain with the employing agency for a period of up to one year.” The retention bonus can be paid as one lump sum or divided into two or more payments. See DHRM Policy No. 3.05, page 15 of 22 (effective 9/25/00, revised 4/25/05).

while at Facility A was a “differential”<sup>6</sup> or “pay supplement”<sup>7</sup> and therefore, was subject to removal upon the grievant’s transfer to Facility B.

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 provision or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy.

In this case, the grievant has failed to raise a sufficient question that the agency misapplied any *mandatory* state or agency policy provision by decreasing her salary by 4.5% when she was involuntarily transferred from Facility A to Facility B. In particular, regardless of how the 4.5% would be classified under the state’s current compensation policy,<sup>8</sup> it is clear from the agency’s proposal for the “special pay rate;” the agency’s September 9, 1999 letter to security staff at Facility A regarding the “special pay rate;” DHRM’s approval of the “special pay rate;” and other documents and records presented to this Department during the course of its investigation that the 4.5% “special pay rate” applies only to security staff located at Facility A. In other words, in the absence of unique circumstances (see discussion below regarding Employees A and B), all security employees that are transferred from Facility A to another DJJ facility, as was the case here, lose the 4.5% upon transfer. Significantly, during this Department’s investigation of the grievant’s claims, a DHRM representative confirmed that the agency acted in accordance with policy when it removed the 4.5% from the grievant’s salary upon her transfer from Facility A to Facility B.

Likewise, the grievant has failed to raise a sufficient question of an unfair application of policy in this case. Specifically, the grievant asserts that there were six

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<sup>6</sup> Differentials are base pay adjustments to make salaries more competitive with the market and may be applied to Roles, Salary Reference (or SOC) Titles, Work Titles, Pay Areas or based on geographic location. See DHRM Policy No. 3.05, page 19 of 22 (effective 9/25/00, revised 4/25/05). Differentials apply to specific positions and are removed when the employee moves from the position where the differential has been applied to another position without the differential. See DHRM Policy No. 3.05, page 19 of 22 (effective 9/25/00, revised 4/25/05).

<sup>7</sup> Pay “[s]upplements are non-base-pay payments that apply to specific positions under certain circumstances” and “apply to situations where employees are doing something in addition to what is normally expected of employees in similar jobs.” DHRM Policy No. 3.05, page 19 of 22 (effective 9/25/00, revised 4/25/05). “Supplements are designed to address unique needs of an agency” and “are processed through payroll as “special payments.” DHRM Policy No. 3.05, page 19-20 of 22 (effective 9/25/00, revised 4/25/05). One type of supplement is a “working conditions” supplement that “may be provided to employees who have unusual risks associated with their positions that exceed the risks normally associated with the work environment of state employees.” DHRM Policy No. 3.05, page 20 of 22 (effective 9/25/00, revised 4/25/05). Pay supplements apply to specific positions and are removed when the employee moves from the position where the supplement has been applied to another position without the supplement. See DHRM Policy No. 3.05, page 19-20 of 22 (effective 9/25/00, revised 4/25/05).

<sup>8</sup> The terms “retention incentive,” “differential” and “supplement” are all terms used in the state’s current compensation policy that went into effect in September 2000. The 4.5% increase in pay at issue here was implemented in October 1999 and did not use those terms to characterize the increase.

employees that were permitted to keep the 4.5% pay supplement after leaving Facility A. Of these employees, one did not transfer from Facility A to another DJJ facility, but rather left state service altogether for a period of time and later came back to DJJ. Thus, this employee does not appear to be similarly-situated to the grievant. Of the remaining five employees, it appears that only two were actually allowed to retain some portion of the 4.5% pay supplement upon leaving Facility A.<sup>9</sup> The first of these employees (Employee A) was permitted to retain the full 4.5% upon her transfer from Facility A to another DJJ facility. According to the agency, however Employee A's voluntary transfer from Facility A to another facility was a direct consequence of a founded EEO complaint and as such, the agency felt it had an obligation to ensure that Employee A did not suffer a decrease in salary as a result of the founded EEO complaint.

There was an additional employee (Employee B) that transferred from Facility A to another DJJ facility and his salary was reduced by only 4.35%. According to the agency, Employee B transferred from Facility A to another DJJ facility in November 1999, one month after the implementation of the 4.5% pay supplement. The agency believes that its failure to reduce Employee B's salary by the full 4.5% in November 1999 was due to a simple error in calculation given that the pay supplement had only been in place a little over a month. Due to the significant amount of time that has elapsed since the error (and presumably the insignificant amount; i.e., .15%, that Employee B was allowed to retain upon leaving Facility A), the agency declined to seek repayment from Employee B for the agency error.<sup>10</sup>

In sum, based upon the unique circumstances of their cases, it appears that there were only two employees permitted to retain either all or some small portion of the 4.5% pay supplement upon leaving Facility A. As such, when the agency removed the 4.5% from the grievant's salary after she left Facility A, it treated her like the vast majority of other similarly-situated employees who left that facility. Accordingly, it does not appear that the agency has acted so unfairly as to amount to a disregard of the intent of the applicable policy.

#### 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

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<sup>9</sup> In making this determination, this Department reviewed the state's Personnel Management Information System (PMIS) records of those employees specifically named by the grievant that were allowed to retain the 4.5% pay supplement. The PMIS records and other information provided by the agency revealed that two of the five employees named by the grievant did in fact lose the full 4.5% pay supplement upon their transfer from Facility A to another DJJ facility, while one of the employees named never received the 4.5% pay supplement while at Facility A because she transferred from Facility A prior to implementation of the pay supplement.

<sup>10</sup> It is unclear whether Employee B is currently receiving the .15%. The agency asserts that he resigned from employment in March of 2002 and was subsequently rehired by DJJ as a wage employee.

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.

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Claudia T. Farr  
Director

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