

Issues: Compliance – Grievance Procedure (30-Day Rule) and Qualification – Compensation (Position Classification and Temporary Pay); Ruling Date: August 22, 2008; Ruling #2009-2059, 2009-2060; Agency: Virginia Employment Commission; Outcome: Grievant in Compliance/Grievant Not in Compliance, Not Qualified for Hearing.



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

**COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR**

In the matter of Virginia Employment Commission  
Ruling No. 2009-2059, 2009-2060  
August 22, 2008

The grievant has requested a ruling on whether his April 22, 2008 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. The grievant seeks a promotion and/or pay increase because he performs supervisory duties. The agency has also asserted the issue of whether the grievant initiated his grievance in a timely manner.

**FACTS**

The grievant alleges that, starting in February 2007, he was asked by the Manager of the office in which he used to work to take on more supervisory duties, presumably because of his knowledge and senior role. These duties were to be assumed when the Manager was out of the office. However, in April 2007, the Manager left the agency, leaving only the Assistant Manager to manage the office. The grievant states he had to undertake supervisory duties more often after April 2007, especially when the Assistant Manager was out of the office when he was left "in charge." The grievant asserts the following in support of his claim that he worked as a supervisor: 1) other office staff treated him as a supervisor (for example, turned in leave slips to him, asked him if they could leave early, and sought his authority when disputes arose in the workplace), 2) he signed off on employee payroll during one week when the Assistant Manager was out of the office, 3) he prepared or assisted in preparing many Employee Work Profiles (EWPs) for staff, 4) he would plan staff work loads, assignments, and schedules with the Assistant Manager, 5) he signed the money log, purportedly an Assistant Manager duty, 6) he conducted staff meetings, and 7) he responded to questions from other agency employees as if a supervisor.

The grievant states that he requested an increase in pay because of these duties on multiple occasions throughout 2007 and early 2008. The grievant then initiated a grievance on April 22, 2008, requesting as relief a promotion to supervisor and/or an increase in pay to a supervisor's salary. Since filing the grievance, the office in which the grievant worked has closed. He no longer engages in supervisory duties at his current office.

## DISCUSSION

### **Compliance**

#### *Timeliness*

The agency has asserted that the grievant was untimely in initiating his grievance. The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.<sup>1</sup> When an employee initiates a grievance beyond the 30-calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

Although the grievant was aware that he would be called upon to undertake certain supervisory duties in February and April 2007, the manner in which the grievant assumed these duties intermittently appears to have been on an “as needed” basis in the absence of a manager rather than a permanent addition to his duties. Therefore, the fact that the grievant first undertook certain supervisory duties on occasion as early as February 2007, which is well over 30 calendar days prior to when the grievance was initiated, does not alone determine the timeliness issue. The grievance is timely to challenge issues involving any supervisory duties assigned to the grievant within the period of 30 calendar days prior to the initiation of the grievance.<sup>2</sup> Accordingly, the grievance is untimely as to any instances beyond that 30-day window.<sup>3</sup> Thus, because the grievant did not initiate a grievance until April 22, 2008, the grievance is untimely to challenge any alleged issues regarding supervisory duties assigned prior to March 23, 2008, and is timely to challenge those issues arising on or after March 23, 2008.<sup>4</sup>

Further, there does not appear to be any evidence of just cause for the grievant’s delay with respect to challenging the assignments he received prior to March 23, 2008. The only point the grievant asserts in opposition to the agency’s timeliness argument is that because his grievance concerns pay, the 30 calendar-day period begins anew with each pay check he received. However, the grievant’s argument is not pertinent. The

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<sup>1</sup> Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

<sup>2</sup> It should be noted that the date on which the 30-day clock begins could be assessed differently for a claim involving an employee’s comprehensive assumption of supervisory duties at a specific point in time. In such a case, the 30-day clock would begin on the date that the employee assumed the comprehensive supervisory duties. In this case, however, such an analysis is not applicable because it does not appear that the grievant ever reached the critical mass of comprehensively assuming supervisory duties. *See infra*. As such, this case is analyzed more as a temporary pay case, based on the *ad hoc* assignment of duties.

<sup>3</sup> Even if the grievance was timely to challenge issues arising more than 30 days prior to the initiation of the grievance, a hearing officer would only be able to award back pay for the 30 calendar day period immediately preceding the initiation of the grievance. *Rules for Conducting Grievance Hearings* § VI(C)(1).

<sup>4</sup> The grievant has stated that he performed certain supervisory roles in April 2008.

paycheck accrual rule to which the grievant appears to refer, to the extent it even applies in this case, is no longer considered by EDR as a basis to extend the filing period.<sup>5</sup>

Further, this Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.<sup>6</sup> A grievant's lack of knowledge about the grievance procedure and its requirements does not constitute just cause for failure to act in a timely manner. This Department's rulings on matters of compliance are final and nonappealable.<sup>7</sup>

## Qualification

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>8</sup> Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries and position classifications "shall not proceed to hearing"<sup>9</sup> unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>10</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>11</sup> An adverse employment action is defined as a "tangible employment action constitut[ing] 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."<sup>12</sup> Adverse employment actions include any agency

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<sup>5</sup> See EDR Ruling Nos. 2007-1708 and 2007-1690 (referencing and broadly applying to the grievance procedure the May 2007 United States Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber, Co.*, 127 S. Ct. 216 (2007) (rejecting the paycheck accrual rule previously used by courts in Title VII discrimination claims)).

<sup>6</sup> See, e.g., EDR Ruling No. 2008-1985; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

<sup>7</sup> See Va. Code § 2.2-1001(5), 2.2-3003(G).

<sup>8</sup> See Va. Code § 2.2-3004(B).

<sup>9</sup> Va. Code § 2.2-3004(C).

<sup>10</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>11</sup> While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. See EDR Ruling No. 2007-1538.

<sup>12</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>13</sup> For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he potentially asserts issues with his salary.

The primary policy implicated by this grievance is Department of Human Resource Management (DHRM) Policy 3.05. This policy provides that “[a]gencies may provide temporary pay to an employee who is assigned different duties on an interim basis, or because of the need for additional assignments associated with a special time-limited project, or for acting in a higher-level position in the same or different Role in the same or a higher Pay Band, or for military pay supplements. Temporary pay is a non-competitive management-initiated practice paid at the discretion of the agency.”<sup>14</sup> In assessing whether to grant pay actions, including temporary pay, an agency must consider, for each proposed adjustment, each of the following thirteen pay factors: (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 licensure; (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.<sup>15</sup> Some of these factors relate to employee-related issues, and some to agency-related business and fiscal issues, but the agency has the duty and the broad discretion to weigh each factor.

Thus, the applicable policy appears to reflect the intent to invest in agency management broad discretion for making individual pay decisions. However, even though agencies are afforded great flexibility in making pay decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.<sup>16</sup>

Though the grievant has shown that he performed certain supervisory duties and was allegedly considered a supervisor by other staff members, he has not shown that the agency's refusal to grant him temporary pay violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policy. The grievant has also presented no evidence that the agency's denial of temporary pay was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. Although the grievant performed some supervisory duties and was a trusted member of the office, it cannot be said that the

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<sup>13</sup> Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997).

<sup>14</sup> DHRM Policy 3.05, *Compensation*, “Temporary Pay.”

<sup>15</sup> DHRM Policy 3.05, *Compensation*.

<sup>16</sup> See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made “[i]n disregard of the facts or without a reasoned basis”); see also, e.g., EDR Ruling 2008-1879.

grievant's service in this regard, based on those duties he performed between March 23, 2008 and April 22, 2008, was so comprehensive or substantial to find that the agency was arbitrary or capricious in refusing to grant him an increase in pay, temporary or otherwise.<sup>17</sup>

The result would be the same for the grievant's claim that he should be promoted to a supervisor position. Although statutory provisions evince a policy that would require state agencies and institutions to allocate positions having substantially the same duties and responsibilities to the same role,<sup>18</sup> the grievance procedure accords much deference to management's exercise 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.<sup>19</sup> 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.

In sum, this Department cannot find that the agency's decision to maintain the grievant's role as a non-supervisor was in disregard of the facts, without a reasoned basis, or plainly inconsistent with other similar job classification decisions. The agency states that though the grievant performed some supervisory duties, he did not perform all the duties of a supervisor. The grievant's supervisory duties appeared to have been more temporary in nature due to vacancies. Further, because the grievant no longer performs these supervisory duties, a promotion to supervisor would appear to be unwarranted. Based on all of the above, this Department concludes that the grievant has not presented evidence raising a sufficient question that the relevant policies have been either misapplied and/or unfairly applied to qualify for hearing.

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<sup>17</sup> Similarly, the grievant has not raised sufficient evidence to indicate that the agency has misapplied or unfairly applied policy by not awarding the grievant an in-band adjustment, bonus, or other increase in pay. DHRM Policy 3.05 reserves to management discretion and flexibility in making these pay decisions as well. There is no indication that the agency violated a mandatory policy provision or acted arbitrarily or capriciously in deciding not to increase the grievant's salary. However, nothing in this ruling is meant to indicate that the grievant could not have been awarded temporary pay or another upward adjustment based on the duties he performed. Indeed, analysis of the pay factors and policy provisions might justify such a pay action if the agency chose to take it. Rather, this ruling finds only that the grievant has failed to show sufficient evidence that the agency misapplied or unfairly applied policy or otherwise abused the discretion granted under DHRM Policy 3.05.

<sup>18</sup> 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).

<sup>19</sup> See EDR Ruling No. 2006-1325; EDR Ruling No. 2003-045; EDR Ruling No. 2001-062.

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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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