

Issue: Qualification – Compensation (Temporary Pay); Ruling Date: August 19, 2008; Ruling #2009-2083; Agency: Longwood University; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Longwood University  
Ruling No. 2009-2083  
August 19, 2008

The grievant has requested a ruling on whether her May 2, 2008 grievance with Longwood University (the University) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

In her May 2, 2008 grievance, the grievant has challenged the University's refusal to grant her temporary pay for certain duties the grievant alleges were delegated to her as a result of departures in her department. The grievant states that she was assigned training coordination duties (normally activities performed by the Training & Organizational Development Manager (Training Manager)) and tasks associated with renewal of certain faculty contracts (normally assigned to the Compensation Manager). The grievant was assigned these duties because both the Training Manager and Compensation Manager had resigned. The grievant also states she prepared and delivered I-9 training for her department.

The agency denied the grievant's request for temporary pay because the duties added were "consistent with appropriate job activities for [her] role." Further, the agency states that the additional duties "do not constitute a significant level of extra duties in order to be awarded temporary pay." The grievant argues that temporary pay has been awarded by the University in many other instances involving vacancies. Additionally, the grievant asserts that 99% of temporary pay requests are approved, based on information from the former Compensation Manager.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</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>2</sup> unless there is

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

<sup>2</sup> Va. Code § 2.2-3004(C).

sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant argues that the University has misapplied or unfairly applied the relevant compensation policies.

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>3</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>4</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>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup> For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that she potentially asserts issues with her pay.

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>7</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

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<sup>3</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>4</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>5</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</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>7</sup> See DHRM Policy 3.05, *Compensation*, “Temporary Pay.”

impact; and (13) current salary.<sup>8</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 regarding temporary pay.<sup>9</sup> 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>10</sup>

Though the grievant has shown that she performed certain duties that were beyond those she was previously engaged in, she has not shown that the University's refusal to grant 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. There is no provision of DHRM Policy 3.05 that requires the University to provide employees with temporary pay any time they are assigned different or additional duties. Further, the University's assertion that the grievant's added duties were consistent with those of her current position and not a significant level of extra duties appears to be reasonable. The University notes that the grievant would have been eligible for overtime if the work required such additional work. However, all the activities were accomplished during the normal work week, according to the University. Additionally, the agency asserts that the grievant was relieved of a portion of her normal duties when she was assigned the additional contract renewal duties. This Department finds no basis that the University abused the discretion granted by the applicable policy in making these determinations.

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. Though the grievant pointed to many instances in which the University awarded temporary pay as a result of vacancies, it appears that in many of these instances the employee receiving temporary pay took on a substantial portion of the duties of another position while performing the duties of his or her current position. In this case, it cannot be said that the additional duties the grievant performed are comparable to the situations in which the University has previously awarded temporary pay. Though the grievant also took on new tasks because of vacancies, she did not accept the entirety of the duties of a vacant position. While vacancies can lead to an approval for temporary

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<sup>8</sup> DHRM Policy 3.05, *Compensation*.

<sup>9</sup> See also Longwood Policy 5227, "Performance Management for Classified Employees" (allowing for variable temporary pay increases as determined by management).

<sup>10</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.

pay, the University's practice does not indicate that every time a vacancy occurs and duties are shared or reshuffled do employees become entitled to temporary pay.<sup>11</sup> As such, it cannot be said that the University was arbitrary or capricious in refusing to grant the grievant temporary pay. 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.<sup>12</sup>

#### 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

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<sup>11</sup> The information provided by the grievant that 99% of temporary pay requests are approved is not compelling. This figure appears to indicate that when a manager or supervisor submits a temporary pay request, these have been typically approved. However, this information does not indicate that every time employees take on additional duties that temporary pay is awarded. The 99% figure only addresses when a request from a manager or supervisor is actually made.

<sup>12</sup> This ruling is not meant to indicate that the grievant could not have been properly awarded temporary pay under the applicable policy. However, the grievant has not provided evidence indicating that the agency's decision not to provide temporary pay was a misapplication or unfair application of the relevant policies.