

Issues: Compliance – Grievance Procedure (other issue) and Qualification – Compensation (reimbursement); Ruling Date: August 24, 2010; Ruling #2010-2396, 2011-2706; Agency: Virginia Department of Transportation; Outcome: Grievant In Compliance, Not Qualified.



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

**COMPLIANCE AND QUALIFICATION  
RULINGS OF DIRECTOR**

In the matter of the Department of Transportation  
Ruling Numbers 2010-2396 and 2011-2706  
August 24, 2010

The grievant has requested a ruling on whether her March 17, 2009 grievance against the Department of Transportation (VDOT or the agency) qualifies for hearing. In addition, the agency has asked for administrative closure of the March 17, 2009 grievance due to the grievant's alleged noncompliance. For the reasons discussed below, the agency's request to administratively close the grievance is denied and this Department concludes that the grievance does not qualify for a hearing.

FACTS

On March 17, 2009, the grievant initiated a grievance challenging the agency's failure to reimburse her for classes taken as part of the agency's Learning Partnership Program (LPP). The grievance proceeded through the management resolution steps without resolution and the grievant sought qualification for hearing from the agency head. The agency head denied the grievant's request for qualification and as such, the grievant sought qualification for hearing from this Department on August 13, 2009.

The grievant subsequently asked this Department to temporarily stay its qualification determination due to a pending documents request. In a letter dated September 11, 2009, this Department agreed to temporarily stay the qualification determination until the documents issue was resolved. The grievant was directed to notify this Department in writing whether she wanted to proceed with her request for qualification once all pending documents issues were resolved.

According to the agency, on November 3, 2009, all documents relevant to the March 17, 2009 grievance were sent to the grievant via certified mail. The certified mail package was returned to the agency as unclaimed on December 5, 2009. The agency claims that it spoke with the grievant in late December regarding the documents and asked her to contact the human resources manager in her district to make arrangements to obtain the documents. According to the agency, the grievant never contacted the human

resources manager regarding the documents. As a result of the grievant's failure to pursue her grievance, on July 8, 2010, the agency requested that this Department administratively close the grievance.

On August 1, 2010, however this Department received a letter from the grievant indicating that she wished to proceed with her request for qualification of her March 17<sup>th</sup> grievance. The agency's request for administrative closure and the grievant's request for qualification are addressed below.

## DISCUSSION

### *Compliance*

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR's) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>2</sup> If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.<sup>3</sup>

The agency's request for a compliance ruling regarding the grievant's alleged failure to make arrangements to obtain the documents that she requested is premature. The agency has presented no evidence that it first gave the grievant written notice of the alleged noncompliance.<sup>4</sup> As such, the agency's ruling request is not ripe for determination and must be denied.

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

<sup>2</sup> *Id.*

<sup>3</sup> While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

<sup>4</sup> *See Grievance Procedure Manual* § 6.3.

This Department's rulings on matters of compliance are final and nonappealable.<sup>5</sup>

### *Qualification*

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>6</sup> Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing."<sup>7</sup> Accordingly, challenges to such decisions do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision.<sup>8</sup> The grievant's March 17, 2009 grievance challenges the agency's failure to reimburse her for classes taken pursuant to the agency's LPP. Accordingly, the grievant is challenging the agency's application of the LPP Implementation Guidelines and thus, her claim is one of misapplication or unfair application of 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>9</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>10</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>11</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>12</sup> Because this case involves the denial of a benefit offered to eligible VDOT employees (i.e., funding for classes), it will be assumed, for purposes of this ruling only, that the grievant experienced an adverse employment action. Nevertheless, because the evidence does not raise a sufficient question that the agency misapplied or unfairly applied policy, this grievance does not qualify for hearing.

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

<sup>6</sup> Va. Code § 2.2-3004(B).

<sup>7</sup> Va. Code § 2.2-3004(C).

<sup>8</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

<sup>9</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>10</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>11</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>12</sup> See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

The policy at issue here is VDOT's LPP Implementation Guidelines. The LPP provides funding support for classified employees to achieve learning goals through pursuit of educational opportunities.<sup>13</sup> Support can include funding for courses, flexible work schedules and educational leave.<sup>14</sup> Participation in the LPP is a privilege, not a right and there are numerous eligibility requirements that must be met before an employee will be approved to participate in the LPP.<sup>15</sup> One such requirement is that the employee "[m]ust complete and submit a 'Tuition Assistance Request Form' at least 2 weeks prior to the class start date for the courses to be taken for the semester."<sup>16</sup> This form is to be submitted to the employee's supervisor who reviews and signs the form if the request is approved and then forwards the form to the LPP Coordinator.<sup>17</sup> In order to be reimbursed for the classes taken, the Tuition Assistance Request must be approved prior to the class start date.<sup>18</sup> If approved, the employee is then reimbursed for the class after successful completion of the class.<sup>19</sup>

In this case, the grievant claims that she submitted the Tuition Assistance Request Form to her supervisor and while the grievant "expected" the classes to be approved, there is no dispute that the grievant did not receive actual approval for the classes prior to the classes beginning. As noted above, in order to be reimbursed for classes taken under the LPP, the employee must receive approval prior to the start of classes. As such, the agency did not misapply the LPP Implementation Guidelines when it denied her reimbursement for classes for which she did not receive prior approval.

Moreover, like the agency, this Department finds unpersuasive the grievant's reasons for not securing the appropriate approval prior to the start of classes. More specifically, the grievant asserts that she completed and submitted a Tuition Assistance Request Form to her supervisor prior to her classes beginning on October 29, 2008; however the grievant's supervisor disputes receiving the grievant's request. The grievant asserts that her "medical issues" and short-term disability (STD) leave prevented her from making copies of the Tuition Assistance Request Form to prove that she had requested approval for the classes as well as prevented her from following up with the agency as to whether her request had been approved prior to the start of classes. In particular, the grievant claims that her medical issues made it difficult for her to go where the copy machine was located so that she could make a copy of the Tuition Assistance Request Form. In addition, the grievant states that she knew the last step in the approval process was to receive a letter of approval prior to the beginning of classes and "expected" the approval letter to be in her mailbox at work, but her medical issues and STD leave prevented her from going to her mailbox to verify.

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<sup>13</sup> VDOT Learning Partnership Program Implementation Guidelines at 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 3-4

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 14.

<sup>19</sup> *Id.*

Assuming, without deciding, that the grievant's medical issues were of such a nature that she was unable to make copies and retrieve her mail, such circumstances do not change the outcome in this case. The grievant had participated in the LPP previously and knew that approval prior to the start of classes was required for reimbursement. The grievant also knew that an approval letter would be received prior to the start of classes if the classes were approved. Accordingly, the grievant should have taken steps to ensure that the classes were approved before actually attending the classes. Even if the grievant were unable to physically go to her mailbox, she presumably could have called the agency to inquire as to whether the classes she claims to have requested approval had been approved. Further, to the extent the grievant is claiming that her STD leave prevented her from securing the appropriate approval, this Department notes that the grievant's last day of work before going out on STD was October 31, 2008. The first day of classes was October 29, 2008. Accordingly, had the LPP Implementation Guidelines been followed, the grievant would have received an approval letter prior to her going out on STD and certainly had the opportunity to inquire as to the status of her alleged request prior to her leave.

Based on the foregoing, this Department concludes that the LPP Implementation Guidelines were not misapplied or unfairly applied. As such, this grievance does not qualify for a hearing.

#### 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. 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