

Issue: Qualification – Compensation (Reimbursement); Ruling Date: August 31, 2009; Ruling #2010-2403; Agency: Department of State Police; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of State Police  
Ruling No. 2010-2403  
August 31, 2009

The grievant has requested a ruling on whether his July 21, 2009 grievance with the Department of State Police (the agency) qualifies for a hearing. The grievant has challenged the agency's plan that he reimburse the agency for salary overpayments. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

According to the agency, in April 2005, the grievant transferred from a work location in Northern Virginia to Henrico. While he was employed in Northern Virginia, the grievant received a regional pay differential. Once he transferred from Northern Virginia, he was no longer entitled to the increased salary. However, the agency did not remove the differential from the grievant's salary until the issue was found in or around April 2009. The agency is seeking to collect the overpayments that occurred during the approximately four years in which the grievant received the Northern Virginia pay differential in error. The grievant has initiated the grievance to challenge this plan for reimbursement.

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, wages, and general benefits "shall not proceed to hearing"<sup>2</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

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

<sup>2</sup> Va. Code § 2.2-3004(C).

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 he asserts issues with his compensation.

Though we understand the grievant’s assertion that the overpayments were not entirely his responsibility, he has not shown that the agency’s decision to recoup the overpayments violated a specific mandatory policy provision. Indeed, both Virginia statutory law<sup>7</sup> and the Department of Accounts’ CAPP Manual<sup>8</sup> appear to permit recovery of such overpayments without regard to fault. Indeed, the CAPP Manual states that “[a]gencies *must* take appropriate steps to collect overpayment.”<sup>9</sup> The grievant has also presented no evidence that the agency’s action was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. Therefore, this Department concludes that the grievant has not presented evidence raising a sufficient question that any policies have been either misapplied and/or unfairly applied to qualify for hearing.<sup>10</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

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

<sup>7</sup> See Va. Code § 2.2-804. Further, the offsets proposed by the agency do not appear to exceed the maximum threshold established in Va. Code § 8.01-512.3.

<sup>8</sup> See CAPP Manual, No. 50510, *Unpaid Leaves of Absences and Overpayments*, at 5. The CAPP Manual also provides that the maximum period of repayment is the period of overpayment. *Id.* It appears that the agency may have flexibility to offer the grievant a longer period of repayment if that would satisfy both parties’ financial concerns and is approved by the Department of Accounts.

<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> This ruling only determines whether under the grievance statutes this grievance qualifies for a hearing. This ruling does not address whether the grievant may have some other legal or equitable remedy or defense regarding the repayment.

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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